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Supreme Court of the United States

OCTOBER TERM, 1957

No. 702 MISC.

MORRIS H. SWITZER,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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No.

MORRIS H. SWITZER,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Chief Justice of the United States and the Associate Justices of the United States Supreme Court:

Petitioner respectfully asks this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit which affirmed his conviction for violations of Section 152, first subdivision, Title 18, U. S. Code and Sections 371 and the sixth subdivision of 152, Title 18, U. S. Code upon two counts of the indictment and which affirmed an order denying his motion in arrest of judgment and for a new trial on the ground of newly discovered evidence.

(A) The Opinions Below

The opinion of the District Court with respect to the motion in arrest of judgment and for a new trial on the ground of newly discovered evidence has not yet been

officially reported; a copy thereof is hereto annexed as an appendix. The opinion of the Court below has been officially reported in 252 F. 2d 139; a copy thereof is hereto annexed as an appendix.

(B) Statement of Grounds of Jurisdiction

1. The judgment of the Court of Appeals was rendered and entered on January 28, 1958 (Pet. App. A).

2. Timely application for rehearing was made on February 10, 1958, and was denied on February 25, 1958. The time of the petitioner to file his petition for the writ of certiorari was extended to and including April 25, 1958, by an order of this Court dated March 18th, 1958 (Pet. App. B).

3. The jurisdiction of this Court is invoked pursuant to 18 U. S. Code, Rule 37 and 28 U. S. Code Section 1254.

(C) Questions Presented for Review

1. Whether the Court of Appeals erroneously affirmed the action of the Trial Court in conducting an essential part of the trial of the petitioner in the robing room of the Judge, in the absence of petitioner, who was then defendant, and while the petitioner was in the courtroom and without any waiver on the part of petitioner or the consent of petitioner in contravention of Rule 43 of the Federal Rules of Criminal Procedure, Title 18, U. S. Code, and in violation of his rights under the "due process" clause of the Fifth Amendment to the United States Constitution and in the taking of testimony in the trial in the absence of petitioner during a permitted absence of the petitioner from the courtroom for the purpose of going to the bathroom.

2. Whether the third count is fatally defective in that it fails to state a crime against defendant, this petitioner, for the reason that it does not allege that the defendant conspired with others to "knowingly and fraudulently" transfer property under the Sixth Subdivision of Section 152, Title 18, U. S. Code. The words "knowingly and fraudulently" being omitted from a description of the alleged proposed transfer in that third count; whether the Court of Appeals erroneously affirmed the failure of the Trial Court to charge the jury as to any legal criteria or definition of the word "fraudulently"; and whether the Court of Appeals erred in affirming the Trial Court's failure to instruct the jury on an essential element of the crime charged in the third count that the alleged proposed transfer was to be a transfer to Berkeley Pennsylvania Corporation.

3. Whether the petitioner was erroneously deprived of a fair and impartial trial in violation of his rights under the Sixth Amendment of the United States Constitution which provides that in all criminal cases, the accused is to be informed of the nature and cause of accusation, by the admission of evidence at the trial of a separate and independent crime not charged against him in the indictment; also by the failure of the Trial Court to instruct the jury that proof of the independent crime was not proof of the crime charged against petitioner in the third count.

4. Whether the Court of Appeals erroneously affirmed the action of the Trial Court in its failure to give petitioner a fair and impartial trial because the Trial Court adopted the role of prosecutor in conducting the trial; that the Trial Court asked at least 920 questions (petitioner's minimum count) on both direct and cross-examination of witnesses, including petitioner; and constantly erroneously rebuked petitioner and his counsel in the course of the trial and in the presence of the jury and

conveyed to the jury the Court's disbelief of petitioner's testimony.

5. Whether the Court of Appeals affirmed an abuse of discretion, contrary to the "interest of justice", on the part of the Trial Court in its denial of the motion in arrest of judgment and for a new trial when the newly discovered evidence materially and substantially altered the facts upon which the jury predicated its verdict of guilt on the second count.

6. Whether the Court of Appeals erred in affirming the following actions of the Trial Court;

(a) giving the indictment herein to the jury for consideration when count one thereof is not directed against this petitioner and without cautioning the jury not to read count one; (b) refusing to admit evidence under the "Completeness Doctrine", a document made competent by Government counsel who introduced portions of the document into evidence; (c) permitting the prosecutor in his argument to the jury to read portions of the Grand Jury minutes which were not in evidence; (d) permitting five Government witnesses to testify to conclusions without giving testimony of facts to support such conclusions; (e) failing to continue the case to enable a subpoenaed witness for the defense, who was temporarily ill to appear and give vital and effective testimony in favor of petitioner; (f) and failing to require a Government witness to produce vital documents in favor of petitioner as required by a subpoena duces tecum.

(D) Statutes and Rules Involved

Section 152, First and Sixth Subdivisions, Title 18, U. S. Code. *Concealment of assets; false oaths and claims, bribery.*

"Whoever knowingly and fraudulently conceals from the receiver, custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or from creditors in any bankruptcy proceeding, and any property belonging to the estate of a bankrupt, or"

"Whoever, while an agent or officer of any person or corporation and in contemplation of a bankruptcy proceeding by or against such person or corporation, or with intent to defeat the bankruptcy law, knowingly and fraudulently transfers or conceals any of the property of such person or corporation,

Shall be fined not more than $5,000 or imprisoned not more than five years, or both."

Section 371, Title 18, U. S. Code. *Conspiracy to commit offense or defraud United States.*

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisonment for not more than five years, or both. If however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

Rule 12 (b) (2), Federal Rules of Criminal Procedure, Title 18, U. S. Code. *Pleadings and Motions before trial; Defenses and Objections.*

"(b) *The Motion Raising Defenses and Objections.*

(2) *Defense and Objections Which Must Be Raised.* Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding."

Rule 30, Federal Rules of Criminal Procedure, Title 18, U. S. Code. *Instructions.*

"At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

Rule 33, Federal Rules of Criminal Procedure, Title 18, U. S. Code. *New Trial.*

"The court may grant a new trial to a defendant, if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period."

Rule 43, Federal Rules of Criminal Procedure, Title 18, U. S. Code. *Presence of the Defendant.*

"The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules. In prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has commenced in his presence shall not prevent the continuing the trial to and including the return of the verdict. A corporation may appear by counsel for all purposes. In prosecutions for offenses punishable by fine or by imprisonment for not more than one year or both, the court, with the written consent of the defendant may permit arraignment, plea, trial and imposition of sentence in the defendant's absence. The defendant's presence is not required at a reduction of sentence under Rule 35."

Rule 52 (b), Federal Rules of Criminal Procedure, Title 18, U. S. Code. *Harmless Error and Plain Error.*

"(b) *Plain Error.* Plain error or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

Fifth Amendment to the United States Constitution.

"AMENDMENT V—CAPITAL CRIMES; DUE PROCESS

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Sixth Amendment to the United States Constitution.

"AMENDMENT VI—JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Section 6, Municipal Court Code of the State of New York. Pertinent text set forth in appendix.

Section 130, Municipal Court Code of the State of New York. Pertinent text set forth in appendix.

Section 660, Civil Practice Act of the State of New York. Pertinent text set forth in appendix.

Section 707, Civil Practice Act of the State of New York. Pertinent text set forth in appendix.

Article 3-A,—Sections 50-58 1 of the Personal Property Law of the State of New York. Pertinent text set forth in appendix.

(E) Statement of Case

Counsel for petitioner begs this Court's indulgence should this petition appear lengthy for the reason that they only recently came into the case and there has been insufficient time to thoroughly digest all of the facts and principles of law in the short space of time intervening, particularly when so many prejudicial errors are apparent and so many principles of law are involved.

This is an unusual and pitiful case. Here, a lawyer, the petitioner, was sold down the river by clients, although not being guilty of the crime of conspiracy, nevertheless took the easiest road and buried the petitioner for reasons they thought advantageous to their liberty. Of the five alleged co-conspirators, other than petitioner, for their cooperation, two were named as co-conspirators, but were not indicted. One had the case against him severed (R. 4), with the understanding that when the case against petitioner is disposed of, it will be dismissed. The fourth, who pleaded guilty, and whose sentence was deferred to a time after the disposition of the trial (R. 10), received a suspended sentence (R. 1462). And the fifth, who was the

sole defendant named in the first count, in which he was charged with the crime of using the mails to defraud in connection with a false financial statement to the extent of $230,000, was permitted to plead guilty to the conspiracy count, but not the first count of using the mails to defraud, for its effect upon the jury in the case against petitioner, had the first count dismissed with the Government joining in the motion to dismiss it (R. 1465), and, after sentence was deferred to the conclusion of the trial against petitioner (R. 8), had execution of his sentence suspended (R. 1464).

In addition to the almost impenetrable atmosphere created by the foregoing for its effect upon the jury, the Trial Court committed so many prejudicial errors in the conduct of the trial, with the participation in many of them by a willing prosecutor, that the conclusion is inescapable that petitioner's constitutional rights to a fair and impartial trial were violated. Those errors in the conduct of the trial were in addition to the errors committed by the Trial Court in connection with the substantive law involved.

In the appeal to the Court below, the Court of Appeals waived the necessity of the filing of an appendix in that Court by petitioner because of his straitened financial condition brought about by this case and by the expenses of an extended illness and death of petitioner's wife. The Government, however, filed an appendix on the appeal to the Court below. That appendix though, not only omitted testimony favorable to petitioner, the cross-examination of Government witnesses at which their testimony was broken down, but also omitted much of the proceedings where the errors occurred. In one instance particularly, the Court of Appeals was misled by such omission which will be discussed later in this petition. Where reference is made to the Government's appendix filed in the Court below, the page number will be preceded by the designa-

tion "Res. App." In instances of reference to the record, the page number will be preceded by the designation "R". Any reference to the appendix of petitioner annexed to this petition will be designated "Pet. App."

The indictment herein originally contained three counts. The first count was not directed to the petitioner but solely to one of the co-defendants referred to, not on trial, in which he was charged with that crime of using the mails to defraud, Title 18, Section 1341, U. S. Code (Pet. App.) which was severed (R. 3-4) and eventually dismissed (R. 1465).

The second count was addressed solely to the petitioner and charged him with the crime of knowingly and fraudulently concealing assets from a Trustee in Bankruptcy, Title 18, First Subdivision of Section 152, U. S. Code (Res. App. 1a).

The third count, although arising from the same bankruptcy case as was involved in the second count, was an independent and unrelated crime from that contained in the second count. Unfortunately Trial Counsel for the petitioner did not move the Trial Court for an election as to which count the Government would proceed to trial as provided for under Rule 14, Federal Rules of Criminal Procedure, Title 18, U. S. Code. That third count charged the four named defendants and two other persons, named as co-conspirators but not indicted, with a conspiracy, Title 18, Section 371, U. S. Code, in contemplation of bankruptcy and with the intent of defeating the National Bankruptcy Act, to transfer the property of one corporation, Berkeley Jewelers, Inc. to another corporation, Berkeley Pennsylvania Corporation, Title 18, Sixth Subdivision of Section 152, U. S. Code, under the following plan: That Jack Fellerman was an unsecured creditor of Berkeley Jewelers, Inc.; That defendants would cause Berkeley Jewelers, Inc. to confess judgments in favor of

Jack Fellerman, thereby enabling him to become a judgment creditor of Berkeley Jewelers, Inc.; That the defendants would cause execution to be had on said judgments and that the assets of that corporation would be levied upon by a Marshal of New York City and sold at the Marshal's sale; That a receipt (bill of sale) would be made out to a nominee of the defendants; That a new corporation would be formed, namely Berkeley Pennsylvania Corporation; "and that thereafter, in contemplation of a bankruptcy proceeding against Berkeley Jewelers, Inc. and with the intent to defeat the bankruptcy law, the assets of Berkeley Jewelers, Inc. would be transferred to Berkeley Pennsylvania Corporation." It is to be noted that the charging paragraph does not allege that the property of Berkeley Jewelers, Inc. would be "knowingly and fraudulently" transferred to Berkeley Pennsylvania Corporation (Res. App. 2a-4a).

In order to set out the facts of the case in chronological order, it is necessary to discuss the facts involved in the third count before those of the second count.

The petitioner, an attorney (R. 86, 883) had rendered legal services to Berkeley Jewelers, Inc. (R. 86, 87, 201-202, 891-894). During the years 1948 and 1949, Albert B. Faskow, the president and sole stockholder of Berkeley Jewelers, Inc. (R. 80) sought petitioner's help in securing loans for the corporation (R. 87, 96-97, 113). In addition to any loans which the petitioner helped the corporation to secure, the corporation borrowed other substantial sums from sources in which transactions the petitioner did not participate (R. 260, 264-269, 277-280). Among the loans negotiated by the petitioner for that corporation, were several that were made by a Jack Fellerman and Sam Mintz, as joint lenders (the latter two being named as co-conspirators but not indicted under the third count of the indictment) which loans totalled $4000. (R. 97, 101, 560-562) and were made in the fall of 1948 (R. 96, 101,

557, 561). The petitioner personally guaranteed the repayment of those loans totalling $4000. (R. 97, 104-105, 557-559, 562, 575, 583). Those loans of $4000. were never repaid (R. 107, 562-563, 577) so that Fellerman and Mintz were bona fide creditors of Berkeley Jewelers, Inc.

Thereafter four confessions of judgment, each in the sum of $1,000. were executed by Berkeley Jewelers, Inc. in favor of Jack Fellerman (R. 146, 158, 606-608, Defendant's Exhibit R). Those confessions of judgment were dated December 15, 1949. The Government attempted to establish that those confessions of judgment were executed in January, 1950, through the testimony of Mr. Faskow (R. 145-146, 152, 155, 300-301) yet Mr. Mintz, a government witness testified that there was a lapse of at least a month between the date of the execution and delivery of those confessions of judgment and the entry of judgments thereon (R. 585) and that he had agreed to wait a month before taking action on them (R. 585). The testimony of Mr. Mintz on that point is of importance since the defense contended that the execution of those confessions of judgment were executed and delivered solely for the purpose of placating that creditor to obtain from them a month's grace during which time the corporation would attempt to obtain funds with which to pay off the indebtedness (R. 930-935) since Mr. Faskow was carrying on negotiations with a Mr. Shapiro for a partner who was to make a substantial investment in the business of the corporation (R. 296-298, 930-935), and had nothing to do with any conspiracy.

Thereafter judgments were entered on the confessions by an attorney, Benjamin H. Chasin, in the Municipal Court of the City of New York, Second District, Borough of Manhattan (R. 608), executions were issued thereon (R. 608, 613) and a Marshal of New York City levied upon the property of Berkeley Jewelers, Inc. pursuant to such executions (R. 609, 613, 617), notices of sale were posted con-

spicuously by the Marshal in three places according to law (R. 617-618) with a sale date of January 28, 1950. A custodian was placed in the premises (R. 759) at the instructions to Mr. Fellerman by his attorney (R. 609). The sale by the Marshal was held on January 28, 1950 (R. 621). All of those acts commencing with the confessions of judgment through the Marshal's sale were lawful acts performed in conformance with the statutes of the State of New York.

At the sale, the only bidder was Mr. Mintz (R. 572). The merchandise was sold for $1200. (R. 627) and the right, title and interest of the judgment debtor in the fixtures, subject to a chattel mortgage, were sold for $100. which together with sales tax brought a total of $1326 (R. 628). The Government made a big issue of the sales price of $1300., referring to it as a rigged sale, but it may be pointed out that the amounts of the judgment and the expenses of the custodian, Marshal's fees and expenses of the sale exceeded $4500. and the only effect of the sale price being $1300. up to $4500 or so would be the amount of the Marshal's fees and the fees of the attorney for the judgment creditor for the reason that the proceeds of the sale, less those fees would eventually revert to the judgment creditor anyway.

Mr. Faskow and Mr. Shulman, who were not present at the sale (R. 166, 477), testified that it was a part of the alleged conspiracy that the bill of sale would be made out in the name of Irving Shear (R. 149, 473) yet Mr. Mintz, the actual purchaser, testified that that question first arose when the Marshal inquired as to the name of the purchaser to record same on the bill of sale *after* the sale occurred (R. 572).

The third count finally charges that the assets would be transferred to Berkeley Pennsylvania Corporation. The testimony offered by the Government fell far short of that allegation. Mr. Faskow testified that the sale merchan-

dise was to be used to repay the loans to Fellerman and Mintz and Bucknell Trading Corp., another bona fide creditor (R. 146, 147, 157, 158) and that only the balance, if any, would go to Berkeley Pennsylvania Corporation (R. 146, 147, 148) and that his stake in permitting the transaction was that he would be "guaranteed a job in this new corporation" (R. 148). Mr. Shulman, testified at page 473 of the record when questioned by the Trial Court that Bucknell Trading Corp. and Mintz (co-lender with Fellerman) were to be the beneficiaries of the sale merchandise without ever mentioning Berkeley Pennsylvania Corporation. It is significant to note that, in addition to the $4000. owed to Fellerman and Mintz, Berkeley Jewelers, Inc. owed about $20,000. to Bucknell Trading Corp. (R. 321, 337) so that there was no probability of anything remaining to be transferred to Berkeley Jewelers, Inc., the proposed beneficiary of the conspiracy under the third count. That merchandise was appraised by the Government's expert witness, the appraiser appointed by the District Court in the eventual bankruptcy proceedings, at $18,766.50 (R. 892) and the eventual sales price of the merchandise, which was turned over to the Trustee under a stipulation in the bankruptcy proceedings (R. 796, Defandant's Exhibit GG), was $10,000. (R. 856). The petitioner was one of the prime movers in obtaining the execution of that stipulation under which possession of the merchandise sold at the Marshal's sale was turned over to the Trustee (R.794, 955-957, 958-959, 973-975, Defendant's Exhibit GG).

The third and fourth alleged co-conspirators, Fellerman and Mintz, gave no testimony whatsoever about any proposed transfer to Berkeley Pennsylvania Corporation. The fifth alleged co-conspirator, Mr. Shear, testified that he did not even come to New York until after the sale was held (R. 667-668). It is worthy of note that both Faskow and Shear testified that none of the merchandise was in fact used by the new corporation (R. 180, 676, 700).

In its charge to the jury, the Trial Court did not instruct the jury that it must find that the object of the conspiracy was that the property of Berkeley Jewelers, Inc. would be transferred to Berkeley Pennsylvania Corporation, as charged in the third count, in order to find the defendant guilty of the crime charged therein. Nor did the Trial Court give any definition or give any legal criteria as a guide to the jury in the determination of the meaning of the word "fraudulently" which the Sixth subdivision of Section 152, Title 18, U. S. Code prescribes as a prerequisite of that crime.

Although the conspiracy alleged in the third count is the transfer of property to Berkeley Pennsylvania Corporation and the Government conceded at the trial, in the course of argument on a preliminary motion, that the third count did not allege a concealment or a conspiracy therefor, and that it did not propose to offer any such evidence (R. 17-18), the Government adduced a vast amount of testimony of an alleged independent crime, that of the withdrawal and concealment of certain lots of merchandise before the Marshal's sale (R. 167-168, 475-478, 945, 1280) and its eventual disposal by private sale with the proceeds being used in liquidation of the indebtedness of Berkeley Jewelers, Inc. to Bucknell Trading Corp., a bona fide creditor (R. 482, 529-530) which the defense contended was merchandise pledged to Bucknell Trading Corp. under trust receipt transactions and which that entity did what it had the right to do under the Uniform Trust Receipt Laws of the State of New York (R. 319, 378, 431, 466, 510-511, 943, 945, 1280). No testimony was offered to prove that any of that merchandise was to be transferred to Berkeley Pennsylvania Corp. Prior to the trial, the defendant was not apprised of the nature of that alleged independent crime and did not know that he would be called upon to defend himself against that charge at the trial.

In its charge to the jury, the Trial Court gave a commentary of the evidence under the third count and in that commentary it referred to the alleged independent crime as being a component part of the crime charged (R. 1403-1405). The Trial Court did not charge the jury that proof of the alleged independent crime was not to be considered as proof of the crime charged in the third count. Even if that proof of the alleged independent crime were admissible for the purpose of showing intent, the charge to the jury failed to limit that proof to that element of the crime charged. The Trial Court gave a one-sided review of the testimony under the third count. It failed to even discuss the defense contention that the acts alleged from the execution of the confessions of judgment through the Marshal's sale were lawful acts under the statutes of the State of New York and which acts could be considered fraudulent to support the third count. Likewise, the Trial Court failed to even discuss the defense contention that the merchandise taken by Bucknell Trading Corp., the alleged independent crime, was lawfully taken under the Uniform Trust Receipts Law in the Personal Property Law of the State of New York.

The second count of the indictment charged the petitioner with the crime of knowingly and fraudulently concealing assets from the Trustee in Bankruptcy. During the pendency of the bankruptcy proceedings, a Trustee was elected by the creditors whose appointment was approved by the Referee in Bankruptcy (R. 72-73, Government's Exhibit 1D), although the Government never proved that the Trustee qualified by the posting of a bond as required by Section 78 (b), Title 11, U. S. Code or that he notified the Referee in Bankruptcy of his acceptance pursuant to General Order 16.

The undisputed facts under the second count were that the petitioner was a member of the bar (R. 86, 883) and that he was co-counsel for the bankrupt (R. 76, 776); that

the Trustee abandoned the fixtures formerly owned by the bankrupt that were subject to a chattel mortgage because he felt that there was no equity above the mortgage (R. 777); that the Trustee never took possession of the premises formerly occupied by the bankrupt (R. 777-779); that the landlord of the premises requested the removal of the fixtures from the premises and sought possession of the premises (R. 779, 1008-1009); that the attorneys for the Trustee gave the petitioner permission to enter upon the premises to provide for the removal of the fixtures (R. 778-779); that upon entering the premises and examining the safe therein, some merchandise was found in the safe (R. 880, 881, 1011), Government's Exhibits 19A, 19B, 19C); that the merchandise consisted of several hundred cheap, miscellaneous jewelry items which were appraised by the Government's own expert witness at only $250 (R. 826). (In this connection, it is significant that although the Government produced all other exhibits at the argument of the appeal before the Court of Appeals, the Government refrained from producing those jewelry items at the argument for the Court of Appeals to observe the subject of that alleged concealment); that the petitioner removed the merchandise from the safe (R. 772) and took same to his office (R. 1012); that a telephone conversation took place between the petitioner and the office of the attorneys for the Trustee during which conversation that merchandise taken from the safe was discussed in which the petitioner agreed to write a letter to the attorneys for the Trustee in which an inventory of that merchandise would be given after which the attorneys for the Trustee would give the petitioner instructions for the disposition of that merchandise (R. 1012-1013); that the petitioner had typed out such letter (R. 807, 1013, Government's Exhibit 20); that after the typing of that letter but before it was mailed, two agents from the Federal Bureau of Investigation came to the petitioner's office with a warrant of arrest of the petitioner (R. 806); that a conversation took place between the petitioner and the

agents, during which the petitioner exhibited the letter addressed to the attorneys for the Trustee (R. 807), and a copy of that letter was given to the agents (R. 807, 1017); that the petitioner gave the merchandise removed from the safe to the agents (R. 808); that the petitioner was arrested by the agents (R. 806); that after the arrest, the petitioner was taken to the office of the United States Attorney for the Southern District of New York at which office the petitioner made a statement of the facts concerning the details of the crime charged; that neither the agents nor the Assistant United States Attorney ever informed the attorneys for the Trustee about that letter (R. 785-786); that the attorneys for the Trustee never heard about that letter and never saw that letter until shown to one of such attorneys upon cross-examination at the trial; and that the original of that letter was impounded by the Grand Jury (R. 1018).

In order to establish his innocence of the crime charged at the trial under the second count, the petitioner testified that after the telephone conversation with the office of the attorneys for the Trustee in which he was granted permission to enter the premises and arrange for the removal of the fixtures abandoned by the Trustee and to have the landlord obtain possession of the premises, he communicated with the mortgagee of the fixtures (R. 1009) and arranged for a meeting with the mortgagee at the premises (R. 1010); that the mortgagee and several other people met him at the premises (R. 1010) which was about the middle of the month of May, 1950; that after the safe was opened and the merchandise was discovered, the petitioner stated to those present that he was taking the merchandise for safekeeping and would turn same over to the Trustee (R. 1012); that after returning to his office with the merchandise removed from the safe, petitioner telephoned the office of the attorneys for the trustee and informed that office of the discovery of the jewelry items in the safe and that he was requested by

the attorneys for the trustee to write them a letter giving the inventory and was informed that after the receipt of the letter, the attorneys for the trustee would give the petitioner instructions for the disposition of the merchandise (R. 1012-1013); that the petitioner agreed to write such letter (R. 1013); that thereafter the petitioner did have such letter typed (R. 1013); that the petitioner placed that letter in his pocket for the purpose of mailing same on May 29, 1950, but did not immediately mail it because he inadvertently wrote something on the envelope after taking same from his office (R. 1013); that the following day was a legal holiday for which reason the petitioner did not return to his office to type out a new envelope (R. 1014); that on May 31, 1950, after the agents of the Federal Bureau of Investigation came to his office, the petitioner took that original letter enclosed in the soiled envelope from his pocket in the presence of the agents (R. 1016); and that all of the aforesaid facts were included in the statement made by the petitioner to the Assistant United States Attorney after his arrest.

In dispute of some of that testimony of the petitioner, the Government offered the testimony of two witnesses, Carl Johansen, the elevator operator of the building, and Joseph H. Frier, one of the attorneys for the Trustee. Mr. Johansen testified that the incident occurred sometime in the month of May, 1950 (R. 772); that nobody entered the premises before the visit of the petitioner (R. 773-774); that the only other person that came into the premises was a lighting fixture man, who came *after* petitioner's visit (R. 774); that when the petitioner was in the premises, nobody other than himself was present (R. 774); that he could not identify what the petitioner removed from the safe since he was "20, 25 feet away" from petitioner at the time (R. 772); and that all that he observed was that petitioner removed something from the safe which the petitioner took with him when he left the building (R. 772).

After the trial, petitioner discovered for the first time that Mr. Johansen had testified before the Referee in Bankruptcy in the 21a examination in the bankruptcy proceedings on July 24, 1950, about two months after the occurrence whereas the trial took place about six years later (R. 1588). It is uncontrovertible that the recollection of a witness would be greater two months after the occurrence of the incident rather than six years later, the time of trial. At the 21a examination, Mr. Johansen testified that the incident occurred during the middle of May, 1950, (R. 1588, 1591); that other people came to the premises before the petitioner and that "they opened it (the safe)" (R. 1588, 1591); that as the safe was closed, the petitioner came to the premises (R. 1588); that he observed the merchandise in the safe prior to petitioner's arrival (R. 1588); that the petitioner removed two boxes (trays), one of which had a leather cover and which trays were an inch deep, twelve inches long and six inches wide (R. 1589).

In its charge to the jury, the Trial Court added to Mr. Johansen's testimony by attributing to him testimony that Mr. Johansen "saw him (the defendant) take something out and put it under his coat" (R. 1400), despite the fact that the month of May is not a month during which men wear coats. The Trial Court in its decision denying the motion in arrest of judgment and for a new trial upon the ground of newly discovered evidence stated that whether Mr. Johansen had testified that the petitioner placed what he had removed under his coat was "crucial to Switzer's present claim" (R. 1615) and went so far as to hold a hearing at which the Court Reporter was called upon to testify whether his stenographic notes contained such testimony (R. 1615) since such an act would indicate surreptitiousness. The fact that the Trial Court gave the force of such testimony to an eye-witness would have the same effect on the jury as though such witness had given such direct testimony.

The main serious ground upon which the Government opposed the motion in arrest of judgment and for a new trial was that such newly discovered evidence merely attacked the credibility of the witness and that such newly discovered evidence was available to the defendant at the time of trial. Such newly discovered evidence altered the very facts upon which the jury predicated its verdict of guilt and indicated that the trial testimony was mistaken if not false. Certainly any evidence that would render the trial testimony mistaken or false testimony would affect the credibility of the trial witness. The contention of the Government concerning the availability of the newly discovered evidence is untenable when it can be seen that such evidence was at least equally available to the Government with its greater resources for investigation and it is impossible to believe that the Government would withhold such contradictory testimony from the Trial Court if such were in the Government's possession.

The Trial Court, in its opinion in which it denied the motion stated that it does "not believe that he (petitioner) first learned of Johansen's prior testimony only after the trial" (R. 1617). It is inconceivable that an attorney on trial for a crime who had knowledge at the trial of such contradictory testimony of a vital government witness would not make use of it at the trial.

The other government witness that disputed some of the testimony of the petitioner was Mr. Frier, one of the attorneys for the trustee. He testified that after he learned of the removal of the merchandise by the petitioner from the safe, he telephoned the petitioner and inquired about that fact to which the petitioner denied having taken anything (R. 779-780); that he telephoned the petitioner a second time and informed the petitioner that after making another check, he was informed that the petitioner had removed three or four trays from the safe to which the petitioner ~~denied~~ admitted taking the merchandise but claimed

that they were of no consequential value and that the petitioner would write him a letter explaining the situation but that he never received any letter from the petitioner (R. 780-781). It is apparent that Mr. Frier's testimony was colored by the fact that the agents and the Assistant United States Attorney never told him about the letter which was in fact typed out and Mr. Frier harbored the thought for six years that the petitioner never wrote the letter which was promised and presumably that his memory was dimmed by the passage of that great length of time.

Mr. Frier's testimony was a complete surprise to the petitioner when given at the trial for he had no way of anticipating such testimony for which reason he was at a loss to combat that testimony other than deny same at the trial. After the trial and during the pendency of the appeal before the Court of Appeals, while going through the files, the petitioner came across a letter that was sent to him by the firm of Goldman & Frier, the attorneys for the trustee, the import of which first became apparent after hearing Mr. Frier's testimony and to which such significance could not have attached in the preparation for the trial and prior to hearing that testimony. That letter not only indicated that Mr. Frier was mistaken about the conversations and that he was confusing the demand for the merchandise removed from the safe with the merchandise sold at the Marshal's sale and the possession of which was to be turned over to the Trustee under the said stipulation but also that Mr. Frier did not even handle the case during the month of May, 1950. That letter also throws a new light upon certain testimony given at the trial by him. Mr. Frier testified at the trial with positiveness that he knew that he could not have spoken to the petitioner about the stipulation up to May 5, 1950, the date of the execution of that stipulation since a Mr. Jasie and not he had charge of the case (R. 796, 797). That letter clearly indicated that on June 13, 1950,

which date was after the arrest itself, Mr. Frier still was not handling the case and that Mr. Jasie was still in charge of the case (R. 1596). If Mr. Frier was positive that he did not have any conversation with the petitioner up to May 5, 1950, the date of the execution of the stipulation, when a vital matter of the estate was consummated involving many thousands of dollars worth of merchandise, because he was not handling the case and Mr. Jasie was in charge of it, then it indicates the probability that he did not hold the conversations with the petitioner during the month of May, 1950, since Mr. Jasie was still in charge of the case on June 13, 1950. At least it opens the door for further cross-examination to ascertain the date that Mr. Frier did commence handling the case. It seems ludicrous to believe that the petitioner would attempt to conceal property of the value of only $250, when the testimony of the witness Shear, an alleged co-conspirator, testified that none of the Marshal's sale merchandise was to be used and that he was so instructed by the petitioner and that Mr. Faskow, another alleged co-conspirator, also testified that none of the Marshal's sale merchandise was used (R. 180) and the Marshal's sale merchandise amounted to over $18,500, in value according to the Government's expert witness, the appraiser appointed by the District Court.

The Trial Court, in its decision on said motion, misinterpreted the import of that letter as indicated by its comment that the letter "relates only to matter involved in the third count" (R. 1616). True, that letter relates to the merchandise involved in the third count but that is the very point raised by the petitioner that Mr. Frier's office confused the merchandise referred to in that letter with the safe merchandise.

Near the close of the case, the Trial Court excused the jury and summoned counsel for both sides to the robing room behind the courtroom (R. 1287). The defendant was

not called into that robing room and remained in the courtroom proper. While in the robing room, the Trial Court ruled on the various requests to charge submitted by counsel (Res. App. 274a-277a). There was some argument on several of the requests (Res. App. 276a) and defense Counsel took exception to some rulings (Res. App. 275a). Thereafter Defense Counsel made several motions for the dismissal of the two counts of the indictment involved (R. 1291-1293), upon which motions the Trial Court ruled (R. 1292-1293) to which rulings Defense Counsel excepted (R. 1292). Respondent's appendix includes the matter of the requests to charge but does not include any of the proceedings conducted in the robing room in connection with the motions to dismiss. The Court of Appeals in its opinion omits any reference to the matter of those motions. Apparently the Court of Appeals was under the impression that Respondent's Appendix contained the entire history of what occurred in the robing room. Petitioner was not asked whether he waived the right to be present at that stage of the trial nor was his presence in fact waived.

The deprivation of his right to be present at every stage of the proceedings resulted in substantial prejudice which will be pointed out in REASONS RELIED ON in this petition.

During the course of the trial, the Trial Court adopted the role of prosecutor by excessively conducting the examination of witnesses on both direct and cross-examination, including the petitioner. By actual count, the Trial Court asked the various witnesses at least 920 questions. The reason that the petitioner states "at least" is that in many instances, the Court Reporter did not quite make clear where the Trial Court stopped its questioning and where the respective trial counsel carried on. In that tabulation, the count was restricted to questions unmistakably propounded by the Trial Court. In the petitioner's brief to the Court of Appeals, he enumerated

the pages of the record where the questions were unmistakably asked by the Trial Court. That enumeration and designation was not contested by the Government either in its answering brief or upon the argument. The opinion of the Court of Appeals accepted the petitioner's statement as fact (Pet. App. D). An excellent example of that cross-examination of the petitioner appears on pages 1188 and 1189 of the record where the Trial Court asked for the statement given to the Assistant United States Attorney by petitioner after the arrest and read questions and answers from that statement and questioned the petitioner as to the truth or falsity of the answers therein given as well as to the truth or falsity of answers given by petitioner at the trial.

In one instance, during the direct examination of petitioner, a question asked petitioner by his counsel went unchallenged by the Government. The Trial Court interrupted the examination and demanded of counsel that he develop the statement given in answer to the question that went unchallenged, then the Trial Court took over the examination of petitioner and asked questions, thirteen in number, in an attempt to disprove the answer given by petitioner (R. 1005-1007) and then admonished Defense Counsel not to ask questions of such nature (R. 1007).

Furthermore, the Trial Court's cross-examination of petitioner indicated in many instances that the Trial Court disbelieved the petitioner's testimony and must have given that impression to the jury. Typical examples, but by no means all-inclusive, appear on pages 1111, 1144, 1147, 1153, 1169, 1187 and 1207 of the record.

A reading of the record during the later stages of the trial, while petitioner was on the witness stand during cross-examination, will clearly reveal that the Trial Court repeatedly rebuked the petitioner and his Trial Counsel unnecessarily and in a manner which must have prejudicially affected the jury. The Trial Court not only referred

in its charge to the rebukes of petitioner (Res. App. 291a), but even indicated itself that its action may have prejudicially affected the jury by cautioning the jury during the examination of petitioner that its rebukes did not affect the innocence or guilt of the petitioner. One of such instances appears on pages 1181-1182 of the record. The Government, in its answering brief in the Court of Appeals, sets forth 27 instances where the Trial Court admonished the petitioner. Those admonishments or rebukes were administered because the petitioner attempted to give explanations of answers to double questions propounded by the Government or by the Trial Court on cross-examination such as "Did you testify falsely then or are you testifying falsely now?". The reference to pages 1188 and 1189 of the record was an example where the Trial Court itself asked such double questions. The Trial Court on many occasions rebuked Defense Counsel unnecessarily.

There were other instances of prejudicial error committed by the Trial Court. While the jury was deliberating, it sent a letter to the Trial Court requesting the indictment itself and an exhibit (Res. App. 310a). The Trial Court forwarded the indictment and the exhibit to the jury room without any instructions whatever to the jury (Res. App. 310a). That indictment contained the first count directed solely to a co-defendant, not on trial, in which he was charged with the crime of using the mails to defraud. Under such circumstances, the Trial Court should have at least cautioned the jury not to read count one or, in any event, that it was not a crime charged against the petitioner.

The Trial Court further committed prejudicial error in excluding from evidence the document containing the statement given by petitioner to the Assistant United States Attorney after the arrest (R. 1278-1279) under the "Completeness Doctrine" after Government counsel

"opened the door" by using portions of that statement on cross-examination.

The Trial Court further committed prejudicial error by permitting the prosecuting attorney to read to the jury extracts from the Grand Jury minutes (R. 1356-1359) which were not in evidence. A stipulation was entered into the record to the effect that if the Grand Jury stenographer were called as a witness, he would testify that the extracts of the Grand Jury minutes read to the petitioner on cross-examination was a true and accurate transcription of the actual testimony given by petitioner to the Grand Jury (Res. App. 273a-274a). However, that is only a prelude to the offering of those extracts into evidence. But the Government never did offer those extracts into evidence (Res. App. 274a). Not being in evidence, the prosecuting attorney had no right to read them to the jury, particularly when in some instances, the petitioner testified that he did not recall being asked such question or giving such answer approximately four years earlier.

On Tuesday, April 17, 1956, the third to last day of the trial, the Trial Court received a special delivery, registered letter from a Mr. Shapiro, a person often mentioned during the trial, and who was under subpoena served upon him in the City of New York to appear as a defense witness on April 17, 1956. That letter merely contained a certificate from a physician in Boston in which it stated that the proposed witness was under his care for an acute attack of inflamed hemorrhoids and that such prospective witness would be unable to leave Boston until the end of that week. Defense Counsel explained the value of that prospective witness to the defense. The Trial Court again acted as prosecutor and argued against a delay in the completion of the trial to permit that witness to return to New York and testify, instead of permitting the prosecuting attorney to advance

argument and preserving the Trial Court's judicial position. It seems that the Trial Court was more interested in speedily completing the trial than the presentation of that vital proposed testimony to the jury to help it in arriving at a just verdict. The Trial Court's persistence in refusing to arrange for a continuance of the trial until the return of Mr. Shapiro to New York was prejudicial to the petitioner. That incident appears in the record at pages 1054-1066.

During the course of the trial, Defense Counsel requested the Trial Court's permission to permit the petitioner to leave the courtroom to go to the bathroom during a lull in the trial while the jury was examining exhibits. The Trial Court granted that permission but before the return of the petitioner to the courtroom directed that the trial proceed with the taking of testimony. Defense Counsel urged the Trial Court to await the petitioner's return. The Trial Court asked Defense Counsel whether he insisted upon the return of the petitioner or could the trial proceed. When Defense Counsel stated that he did not insist on anything, the Trial Court ordered the trial to proceed and testimony was taken during the petitioner's absence. At no time did Defense Counsel affirmatively waive the necessity of the petitioner's presence. That incident appears in Respondent's Appendix at pages 52a-53a. The testimony taken was that of the chief government witness in which he testified that he told the petitioner of the corporation's financial condition during the month of December, 1949. A reading of the record fails to disclose that the same testimony was given during any other portion of the trial. Deprivation of the petitioner's right to hear that testimony was prejudicial to him.

Another instance of prejudicial error on the part of the Trial Court was its decision to overrule a defense objection (Res. App. 88a) to a line of questioning in

which five Government witnesses testified to conclusions that they testified falsely before the Referee in Bankruptcy or the Grand Jury without particularizing the precise answers that were false (Res. App. 88a, 111a, 134a, 195a, 143a). In the case of the witness, Fellerman, such conclusions were in response to questioning by the Trial Court and without any preliminary testimony that there was a previous conversation with petitioner (Res. App. 143a).

The District Court had jurisdiction under Title 18, U. S. Code, Section 152, first subdivision under count two and under Title 18, U. S. Code, Section 371, 152, sixth subdivision under count three.

The trial resulted in a verdict of guilty against petitioner on the second and third counts of the indictment (Res. App. 310a). The petitioner was sentenced to one year and six months on the second count, with execution of sentence suspended, with three years probation to run after the completion of sentence on the third count and to one year and six months on the third count (R. 1461-1462). Upon appeal the judgment of the District Court and its denial of a motion in arrest of judgment and for a new trial in the "interest of justice" upon the ground of newly discovered evidence was affirmed by the Court below (Pet. App. A). A timely application for rehearing was denied by the Court below.

(F) Reasons Relied On

As to Question 1:

This question concerns the portion of the trial conducted in the robing room and not in the courtroom, in the absence of the petitioner and while he was in the courtroom, without any waiver on his part to be present at

every stage of the trial and the portion of the trial at which the Trial Court directed the taking of testimony during a permitted absence of the petitioner from the courtroom and while he was in the bathroom.

Two phases of the trial took place in the portion of the trial conducted in the robing room. The first concerned the argument on requests to charge, the rulings on those requests, and exceptions taken to rulings. The second was the motions to dismiss, the rulings on those motions and exceptions taken to the rulings.

The Fifth Amendment to the Constitution of the United States provides, among other things,

> "No person shall * * * be deprived of life, liberty or property, without due process of law; * * *."

Rule 43 of the Federal Rules of Criminal Procedure, Title 18, U. S. Code, specifically provides that the defendant shall be present at every stage of the trial unless he voluntarily absents himself. In the case at bar, the defendant was in the courtroom so that the portion of the trial conducted in the robing room could have been held in the courtroom or the defendant could have been called into the robing room. The defendant did not waive his presence at that stage of the trial and in fact was not even asked whether he waived such appearance.

This Court, in reversing a judgment of conviction, in *Shields* v. *United States*, 273 U. S. 583, 47 S. Ct. 478, 71 L. Ed. 787, said at page 588,

> "The request made to the Court jointly by the counsel for the defendant and for the government did not justify exception to the rule of orderly conduct of jury trial entitling the defendant, especially in a criminal case, to be present from the time the jury is impaneled until its discharge after rendering the

verdict. We reverse the judgment without reference to the other causes of error assigned."

In *Ah Fook Chang* v. *United States*, 91 F. 2d 805, the Circuit Court of Appeals, Ninth Circuit, reversed the judgment of conviction on two grounds. The first was that, while the jury was still deliberating, the foreman of the jury came to the chambers of the Presiding Judge *and in the presence of Trial Counsel for the defendant* and the Government requested additional instructions which were given by the Trial Court *in the presence of Defense Counsel*. The second was that the Trial Court communicated with the jury in the absence of both the defendant and his attorney. The facts of the first ground of reversal are set forth in full in the opinion of the *Ah Fook Chang* case at page 808 of that opinion from which it can be readily seen that Defense Counsel was present at the time. In fact, the incident did not appear in the record and was submitted to the Court of Appeals upon affidavit of Defense Counsel as to what had occurred. After that recital of facts at page 808, the Court of Appeals, Ninth Circuit, said at page 809,

> "We believe the action of the trial court was reversible error on two grounds.
>
> The first is that appellants were entitled to be personally present at every stage of the trial. * * * But a trial is supposed to take place in a courtroom, and here even if appellants had been in the courtroom, the proceeding would not have taken place in their presence, for it took place in the judge's chambers. If appellants had absented themselves from the courtroom voluntarily, they would have thus consented to the proceeding in the courtroom, but not at some other place. Cf. Shields v. United States, 273 U. S. 583, 587, 47 S. Ct. 478, 479, 71 L. Ed. 787."

In the instant case, the Court of Appeals stated in its opinion that the *Shields* and *Ah Fook Chang* cases did not apply since "in those cases the court gave additional instructions to the jury after it retired and out of the presence of the defendant and his counsel." It is apparent that the Court of Appeals [illegible] referred to the second ground of reversal in the *Ah Fook Chang* case and completely overlooked the first ground therein cited which took place *in the presence of Defense Counsel in the Judge's chambers.*

In touching upon the portion of the trial that occurred in the robing room, the Court of Appeals referred only to that part of the trial which concerned the matter of requests to charge and overlooked entirely the motions to dismiss, arguments of counsel, rulings on the motions, and exceptions taken thereto. This oversight may be due to the fact that in the Government's appendix submitted on that appeal, the Government only included the matter of requests to charge (Res. App. 274a-277a) but omitted completely the motions to dismiss, arguments thereon, the rulings thereon and the exceptions taken (R1291-1293). In referring only to the matter of the requests to charge, the Court of Appeals attempted to justify the Trial's Court error by stating that "Rule 30 of the Federal Rules of Criminal Procedure, which provides that parties may file written requests for instructions and that the court shall inform counsel of its proposed action on the requests, does not require the court to inform a defendant represented by counsel of its rulings. Nor does it require that the defendant be present while requests are made".

That justification of the Trial Court's procedure could not apply to the motions to dismiss, the arguments thereon, the rulings on those motions, and the exceptions taken thereto, since that Rule 30 only concerns itself with the matter of requests for instructions and not to anything

else. Furthermore, Rule 30 does not vitiate the requirement of Rule 43 that the defendant be present at every stage of the trial. It merely provides that the objections and the grounds of objections be made "out of the hearing of the jury". Nothing is stated in that rule that anything about the requests for instructions be made *out of the hearing of the defendant*. The fact that Rule 30 provides that the Court shall inform *counsel* of its proposed action upon the requests should not be taken as authorization to exclude the defendant from that portion of the trial. By indirection, the Court of Appeals has thus ruled that argument on the requests for instructions, the rulings of the Trial Court, the objections to those rulings and the grounds of such objections are not a part of the trial. If such were the case, that principle could apply with equal force to every motion made at a trial, to every ruling on such motions, to every objection taken at the trial and to every ruling on such objections since they likewise are direct colloquies between the Trial Court and counsel, without the defendant taking active part. Such a principle would likewise conflict with the principle laid down in the *Shields* and *Ah Fook Chung* cases since those cases concerned instructions to the jury in which the defendant takes no active part personally. This very Court has held that a "trial" connotes decisions on the evidence and arguments thereon advanced in open court as well the actual testimony. In *Bridges v. State of California*, 314 U. S. 252, 62 S. Ct. 190, 86 L. Ed. 192, this Court held at page 271,

> "The very word 'trial' connotes decisions on the evidence and arguments properly advanced in open court."

Congress itself, in its table of contents to the Federal Rules of Criminal Procedure, under Chapter VI, designated Rules 23-31, which includes Rule 30, as being applicable to the "Trial".

Furthermore, the jury was present after the Trial Court completed its charge and to make additional requests to charge at that point of the trial with possible resulting objections in the hearing of the jury would be violative of that Rule 30 itself.

On the question of prejudice to the defendant in conducting a portion of the trial in the robing room in the absence of petitioner and without his waiver of the right to be present at that stage of the trial, the Court of Appeals in the case at bar stated "Moreover this defendant certainly was not prejudiced, because he had an opportunity to propose, and did propose, additional instructions later in open court." Firstly, the Court of Appeals was in error when it stated that additional instructions were proposed later in open court for Defense Counsel merely pointed out to the Trial Court that it had omitted to give the jury instructions on one of the requests that the Trial Court had favorably ruled upon (R. 1416). Furthermore, the Court of Appeals for the Second Circuit itself had ruled in other cases that the making of requests for instructions after the Trial Court instructed the jury would be untimely and that the Trial Court may refuse to consider them at that time. In *Darger* v. *United States*, 17 F. 2d 696, the Second Circuit said at page 697,

> "The omnibus request last above quoted * * * was also too late under the rules of the trial court, having been tendered after the close of the colloquial charge."

and in *La Fountain* v. *United States*, 14 F. 2d 562, that Court stated at page 563,

> "We fully approve the action of the trial judge in declining to consider seventy-three written requests to charge tendered to him for the first time only after his charge had been delivered and the exceptions therein noted."

Other circuits have likewise held that requests for instructions made after the charge were untimely. In *Lewis* v. *United States*, 8 Cir., 153 F. 2d 724, the Court of Appeals held at page 726,

> "The request was untimely, coming, as it did, after the court had completed its charge."

In *Affronti* v. *United States*, 8 Cir., 145 F. 2d 3, 9, the Court of Appeals went so far as to hold that a request to charge made after the charge had been completed amounted to nothing more than an objection to the charge.

Secondly, the petitioner was deprived of his right to direct his counsel's attention to the making of various preliminary motions prior to the motions to dismiss and to asking the Trial Court to take judicial notice of certain New York State statutes in connection with the lawful procedures of the confessions of judgment, entry of judgment thereon, execution to the Marshal, levy by the Marshal, the sale by the Marshal, and the relevant provisions of the Uniform Trust Receipt Law under the Personal Property Law of the State of New York referred to in the STATEMENT OF CASE as well as additional requests for instructions to the jury. It must be borne in mind that petitioner was an attorney. It can be presumed that he had some familiarity with legal principles. Under such circumstances he was in the position of calling to his counsel's attention some very serious oversights by counsel.

It has been pointed out under STATEMENT OF CASE that testimony was introduced of an alleged independent crime. Trial Counsel overlooked moving the Trial Court to strike out all of such testimony of the alleged independent crime upon the ground that such crime was not alleged in the third count. Had that motion been granted, it was the intention of the petitioner to then request counsel to move

for a mistrial upon the ground that the jury, having heard such testimony, could not erase such testimony from its mind. Both of those motions would have appropriately been made immediately prior to the motions to dismiss which were made in the robing room in the absence of the defendant. Had either or both of those motions been denied by the Trial Court, upon a ruling that such testimony was admissible to show intent or absence of mistake, it would then have been appropriate to request instructions that the Jury was not to consider such evidence as proof of the crime charged in the third count but was to be restricted to proof of intent or absence of mistake.

Defense Counsel, besides overlooking the matter of requesting the Trial Court to take judicial notice of the said New York State Statutes, also overlooked making any requests to charge that the acts concerning the confessions of judgment were lawful procedures under such statutes and for the Trial Court to instruct the jury what it was necessary for the Government to prove to make out a conspiracy to *fraudulently* transfer the property. In connection with the alleged independent crime, if it was to be considered as proof of intent, Defense Counsel overlooked requesting instructions to the jury that if the jury was to determine that the merchandise taken out and sold and the proceeds going to Bucknell Trading Corp. in liquidation of the indebtedness due it from Berkeley Jewelers, Inc., was lawfully taken out under pledges of trust receipt transactions in accordance with the Statutes of New York State, then such acts did not constitute a crime and the jury then should not even consider such proof of the alleged independent crime as proof of intent or absence of mistake.

Thus we find affirmatively that there was prejudice to the petitioner by conducting that portion of the trial in the robing room in his absence. This Court has held that

if the record affirmatively shows that a defendant was prejudiced, there is reversible error. *Fillippon* v. *Albion Vein Slate Co.*, 250 U. S. 76, 39 S. Ct. 435, 63 L. Ed. 853. The Court of Appeals, Tenth Circuit, held that if the record fails to show affirmatively that no prejudice did result, the verdict cannot stand. By stating in *Little* v. *United States*, 73 F. 2d 861, at page 867,

> "The record failing affirmatively to disclose that no prejudice did result, the verdict cannot stand."

In the *Ah Fook Chang* case, supra, the Ninth Circuit Court of Appeals held that if the record does not disclose whether or not prejudice resulted, it is to be presumed to be prejudicial and to require reversal, by saying at page 810,

> "Finally if the record shows error, but does not disclose whether the error is prejudicial or whether it is not prejudicial, it is presumed to be prejudicial and to require reversal."

The same principles of law are applicable to the incident during the trial referred to in STATEMENT OF CASE at which Defense Counsel requested permission of the Trial Court for the petitioner to go to the bathroom for a few minutes and then directing that the taking of testimony proceed before his return to the courtroom. The Court of Appeals held that there was no irregularity here for the defendant was absent at his own request and the Judge continued after obtaining express permission from defense counsel (Pet. App. D). A reading of the record at that point will indicate that the Court of Appeals was in error in ruling that there was express permission of Defense Counsel. Defense Counsel merely stated that he did not insist on anything when asked by the Trial Court whether he insisted on awaiting the defendant's return to the courtroom or whether the trial could proceed. Further, requesting

permission to be excused for a few minutes during a lull in the trial cannot be considered as consent for the taking of testimony in the defendant's absence. Prejudice resulted to the petitioner for the reason that he was deprived of the right to hear vital testimony from the chief Government witness who then testified that he told the defendant of the corporation's financial condition at about the time of the inception of the alleged conspiracy which testimony the record fails to disclose was thereafter repeated.

As to Question 2:

Originally the Sixth Subdivision of Section 152, Title 18, U. S. Code, made it a crime, among other things, for an officer of a corporation, in contemplation of bankruptcy or with intent to defeat the bankruptcy law, to transfer the property of a corporation. Chapt. 575, June 22, 1938, 52 Statutes 855-6. However, during the year 1948, Congress amended the statute in several ways among which it inserted the descriptive words "knowingly and fraudulently" so that under the present Sixth Subdivision of Section 152, it is a crime for an officer of a corporation, in contemplation of bankruptcy or with intent to defeat the bankruptcy law, to "knowingly and fraudulently" transfer the property of the corporation. Chapt. 645, June 25, 1948, 62 Statutes 689.

Therefore, since the present statute was effective at the time of the alleged crime in the third count, the conspiracy contained in that third count must allege that it was a conspiracy to "knowingly and fraudulently" transfer the property. This the third count fails to do. The charging clause in that third count merely alleges "And that thereafter, in contemplation of a bankruptcy proceeding against Berkeley Jewelers, Inc. and with the intent

to defeat the bankruptcy law, the assets of Berkeley Jewelers, Inc. *would be transferred* to Berkeley Pennsylvania Corporation." (Res. App. 3a). It is apparent that the author of that indictment overlooked the 1948 amendment in drafting that indictment in 1952. A mere allegation of a conspiracy to transfer property with the omission of those essential descriptive words renders that count fatally defective, in its attempt to spell out a crime. The above quoted clause of the third count should have read, "And thereafter, * * *, the assets of Berkeley Jewelers, Inc. would be *knowingly and fraudulently* transferred * * *".

The Court of Appeals in the case at bar, in its opinion, does not directly touch upon this question of the omission of those descriptive words in the allegation of transfer in the third count but indirectly touches upon it. In discussing one of the different points raised upon the appeal, which is not urged in this petition for the reason that petitioner's contention was only supported by a decision of the District Court for the Southern District of New York in *United States* v. *Posner*, 3 F. Supp. 252, and not by any Court of Appeals decision, the Court of Appeals held that "a conspiracy indictment need not describe the substantive crime with the particularity of an indictment for that offense" and further stated that

> "The court then specified the necessary elements in this case by stating that, in order to find Switzer guilty, the jury must find 'that he conspired with others others in contemplation of bankruptcy *knowingly* to transfer property of the corporation'. This general instruction, which succintly listed the elements of the offense, was sufficient, * * *"

In the latter reference to the Trial Court's charge, it is noted that the descriptive word "knowingly" was used but the word "fraudulently" was omitted by the Trial

Court. If it is only a crime to *knowingly and fraudulently* transfer property, then it can only be a crime of conspiracy to conspire to "knowingly and fraudulently" transfer. A conspiracy to merely transfer does not allege a crime under the present statute.

The Court of Appeals' ruling in the instant case is in direct conflict with decisions of other circuits. The Court of Appeals, Third Circuit, held that the omission of an essential word or clause from an indictment rendered that indictment fatally defective even though the court knew what was intended. In *Kutler* v. *United States*, 79 F. 2d 440, the Court of Appeals stated at page 442,

> "Where an essential word or clause is omitted from an indictment, such omission is fatal to the indictment, even though the court may know what was intended."

The Court of Appeals, Ninth Circuit, held that a judgment founded upon a complaint which does not state a crime cannot be sustained. That Court of Appeals ruled in *Johnson* v. *United States*, 206 F. 2d 806, at page 808,

> "As to whether an original motion to dismiss the complaint on the ground that no cause has been stated may be made in this court, we need not concern ourselves because a judgment founded upon a complaint which does not state a crime cannot be sustained. *Sonnenberg* v. *United States*, 9 Cir., 1920, 264 F. 327."

In *United States* v. *Comstock*, 162 Fed. 415, the Court of Appeals, D Rhode Island, said at page 415,

> "The words 'knowingly and fraudulently' are an essential part of the statute, and describe an essential ingredient of the offense. The omission of these words, or any equivalent, is, in my opinion, fatal on demurrer."

In *United States* v. *Yasser*, 114 F. 2d 558, the Court of Appeals, Third Circuit, stated at page 560,

> "A necessary element of the crime described in the statute is that the defendant *knowingly and fraudulently* conceal the property. United States v. Comstock, CC. 162 F. 415; United States v. Rhodes, D. C. 212 F. 513"

The only reference to the words *knowingly and fraudulently* in the third count of the indictment relate to a description of the conspiracy but not to the alleged transfer.

The point may be raised that this question of the omission of the essential descriptive words of the transfer alleged in the third count of the indictment was first raised on the appeal to the Court of Appeals and not to the Trial Court. Reference is made to Rule 12 (b) (2) of the Federal Rules of Criminal Procedure, Title 18, U. S. Code, which provides that "the failure of the indictment or information to charge an offense may be noticed by the court at any time during the pendency of the proceeding". The Court of Appeals, Ninth Circuit, held that under said Rule 12 (b) (2) that question may be raised on appeal for the first time in *Hotch* v. *United States*, 208 F. 2d 244, 250, and in *Johnson* v. *United States*, supra.

Not only does the petitioner contend that the third count of the indictment is defective by its omission of the descriptive words "knowingly and fraudulently", but also that the Trial Court committed "plain error" by its failure to give the jury any instructions as to the definition of the word "fraudulently" in its charge to the jury as any guide for the jury to determine whether the acts complained of were fraudulently done. The Court of Appeals does not directly refer to this point on the appeal in its opinion but in discussing the evidence said "There

is little doubt but that from the testimony at trial (which included the testimony of Switzer's co-conspirators on behalf of the government) the jury could have concluded that Switzer, with intent to defeat the bankruptcy law, knowingly and fraudulently transferred property of the old corporation to the new corporation and to the favored creditors in violation of 18 U. S. C. 152." By its silence, the Court of Appeals in effect rules that the Trial Court did not commit error in failing to instruct the jury on the definition of the word "fraudulently". This is in conflict with the decisions of the Court of Appeals in other circuits and this Court. This Court in *Bollenbach* v. *United States*, 326 U. S. 607, 66 S. Ct. 402, held at page 612,

> "Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria."

In *Morris* v. *United States*, 156 F. 2d 525, the Court of Appeals, Ninth Circuit, ruled at page 529,

> "The charge to the jury should not leave the jurors in ignorance of or leave them to their conjecture as to what constitutes the offense charged."

In *Campbell* v. *United States*, 167 F. 2d 451, the Court of Appeals, Fifth Circuit, said at page 453,

> "An examination of the charge as to count I of the indictment shows that it constitutes chiefly a reading by the court of the jury of all of Section 301 and of count I. Not a word is said as to exactly what is charged in the count nor of what proof is necessary under it. We think this amounts to there having been virtually no charge, and therefore, there is reversible error."

The issue may be raised that Trial Counsel made no exception to the charge. The Courts have consistently held that even though no exception was taken to the charge where there is "plain error", the Courts may take notice of such error. That principle of law is also particularly laid down in Rule 52 (b) of the Federal Rules of Criminal Procedure, Title 18, U. S. Code. This Court followed that rule in *United Brotherhood* v. *United States*, 330 U. S. 395, 67 S. Ct. 775, by stating at page 411,

> "And though the failure to charge was not excepted to, we would not be precluded from entertaining the objection. The erroneous charge was on a vital phase of this case and affected the substantial rights of the defendants. We have the power to notice a 'plain error' though it is not assigned or specified."

In *Screws* v. *United States*, 325 U. S. 91, 65 S. Ct. 1031, this Court held at page 107,

> "It is true that no exception was taken to the trial court's charge. Normally we would under those circumstances not take note of the error. * * * But there are exceptions to that rule. (citing cases). And where the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, we think it is necessary to take note of it on our own motion. Even those guilty of the most heinous offenses are entitled to a fair trial. Whatever the degree of guilt, those charged with a federal crime are entitled to be tried by the standards of guilt which Congress has prescribed."

The Court of Appeals further erred in its conclusion that the Trial Court specified the necessary elements of the third count when it merely charged as one of the essential elements a "transfer of the property of the corporation". The third count does not allege merely a

transfer but alleges a transfer to Berkeley Pennsylvania Corporation. Merely instructing the jury that proof of any transfer is sufficient under the third count is misleading to a jury. The jury may interpret that instruction to mean that if the Government proved any transfer to any entity that the element of the crime charged in the third count was proved. Nowhere in the charge did the Trial Court instruct the jury that it must find that Berkeley Pennsylvania Corporation was to be the beneficiary of the proposed transfer in order to find the petitioner guilty of the crime charged in the third count. This Court has held that a charge should not be misleading and that the verdict of the jury should not be based upon an erroneous presumption given it as a guide. In *Bollenbach* v. *United States*, supra, this Court said at page 614,

> "It would be a long jump at guessing to be confident that the jury did not rely on the erroneous 'presumption' given them as a guide. A charge should not be misleading."

As to Question 3:

There was a substantial and prejudicial variance between the pleading and the proof in connection with the third count. The gist of that count was the transfer of the property of Berkeley Jewelers, Inc. to Berkeley Pennsylvania Corporation. Despite that restriction of allegation, voluminous testimony was introduced concerning an "independent crime", the details of which were set forth in the STATEMENT OF CASE. The third count did not allege any concealment or transfer of any property or the proceeds thereof to Bucknell Trading Corp., the bona fide creditor.

The Court of Appeals recognized that such evidence was proof of an "independent crime" by stating that

> "Switzer claims that this is evidence of an inde-

> pendent crime not charged in the indictment and also constitutes a variance between the pleading and the proof so as to expose him to double jeopardy. But the evidence was clearly admissible to show his intent and the absence of mistake, both of which had been raised by the defense. Switzer was not indicted for the crime of fraudulent transfer; and he cannot protest against a future prosecution for that offense." (Pet. App. D).

There are two objections to the introduction of that evidence of the alleged independent crime. First, since nothing was mentioned in the third count, either in the charging clauses or the overt acts, the defendant was not informed of the nature of that accusation which he was called upon to meet at the trial contrary to the provisions of the Sixth Amendment which requires that in all criminal cases, the accused shall be informed of the nature and cause of accusation. In fact, the testimony of the independent crime far outweighed the testimony of the alleged crime charged in that count, to the extent that a reading of the record would indicate that the independent crime was the subject of the trial rather than the crime charged. The Trial Court itself must have been confused as to the crime charged for in its only commentary of the evidence under the third count, it discussed the evidence of the independent crime and did not even mention anything about any alleged transfer of property from Berkeley Jewelers, Inc. to Berkeley Pennsylvania Corporation, except to state that the latter corporation would take over the so-called lay-away plan, which lay-away plan had nothing to do with the charge in the third count and was only a side issue that was not germane to the issues of the case. That commentary appears on page 301a of Respondent's appendix. It is to be noted that nowhere in that commentary does it state that the object of the conspiracy was the transfer of the Marshal's sale merchandise to Berkeley Pennsylvania Corporation which is the crime charged in the third count.

Second, it can be seen that the jury could have based its verdict on the third count on the belief that the "independent crime" was the precise crime with which the defendant was charged. This confusion is apparent even in the opinion of the Court of Appeals in this case. In its opinion, the Court below states in its opinion,

> "there is little doubt but that from the testimony at trial * * * the jury could have concluded that Switzer, with intent to defeat the bankruptcy law, knowingly and fraudulently transferred the property of the old corporation to the new corporation *and to the favored creditors* * * *".

the "and to the favored creditors", referring to Bucknell Trading Corp. was not the crime charged in the indictment.

It has long been held by this Court that a man cannot be charged with one crime and be convicted of another and that such a variance between the pleading and the proof is fatal. In the early case of *The Hoppet*, 11 U. S. 389, 7 Cranch 389, 3 L. Ed. 380, this Court held at page 394,

> "The rule that a man shall not be charged with one crime, and convicted of another, may sometimes cover real guilt, but its observance is essential to the preservation of innocence. It is only a modification of this rule, that the accusation on which the prosecution is founded, should state the crime which is to be proved, and state such a crime as will justify the judgment to be pronounced."

In *Cochran* v. *United States*, 157 U. S. 286, 15 S. Ct. 628, 39 L. Ed. 704, this Court said at page 290,

> "But the true test is * * * whether it contains every element of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceed-

> ings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction."

That principle was reaffirmed in *Hagner* v. *United States*, 285 U. S. 427, 431, 52 S. Ct. 417, 419.

In *Berger* v. *United States*, 295 U. S. 78, 55 S. Ct. 629, this Court said at page 82,

> "The true inquiry, therefore, is not whether there has been a variance in proof, but whether there has been such a variance as to 'affect the substantial rights' of the accused. The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense (citing cases)."

That principle of law was accepted by various Courts of Appeals in other circuits. *See United States* v. *Wills*, 3 Cir., 36 F. 2d 855, 856; *Guilbeau* v. *United States*, 5 Cir., 288 Fed. 731, 732, 733.

Thus we find that the arguments advanced by the Court of Appeals in its opinion that the jury could have concluded that the defendant knowingly and fraudulently transferred the property of the old corporation *to the favored creditors* and that the defendant cannot protest against a future prosecution for that offense are arguments in support of a reversal rather than an affirmance of the judgment of conviction.

The difficulty with the contention of the Court of Appeals in the case at bar that the evidence of the independent crime is admissible for the purpose of showing intent or absence of mistake is that the Trial Court did not even charge the jury that it was only to be considered by it for that purpose but included that evidence of proof of the crime charged, in conflict with the decisions of the Court of Appeals of other circuits. It has been held that if proof of an independent crime is admitted for the purpose of showing intent, it is incumbent upon the Trial Court to so instruct the jury. In *Malaga* v. *United States*, First Circuit, 57 F. 2d 822, the Court said at page 825,

> "The jury was instructed that this alone was sufficient to constitute the offense set forth in the statute but it was not pointed out to the jury that this was not the offense charged in the indictment. By this instruction we think the jury must have been misled as the offense actually *charged in the indictment*. Even though the evidence warranted it, the respondent could not be convicted of an offense with which he was not charged."

In *Minner* v. *United States*, 10 Cir., 57 F. 2d 506, the Court of Appeals ruled at page 512,

> "The evidence shows that this was a separate and distinct conspiracy. It did not show that it was connected with, related to, or in furtherance of the conspiracy charged. It was inadmissible in this case for any purpose."

In the case at bar, the concealment or transfer of property or the proceeds thereof to Bucknell Trading Corp., the so-called favored creditor, had nothing to do with the alleged transfer of property from the old corporation to the new one. They were separate, distinct and independent crimes.

If the jury predicated its verdict of guilt on the proof of the independent crime and the petitioner "cannot protest against a future prosecution for that offense", he is not protected against another prosecution for the same offense.

As to Question 4:

It has been pointed out in the STATEMENT OF CASE that the Trial Court adopted the role of prosecutor by asking at least 920 questions on direct and cross-examination of witnesses, including petitioner, indicated disbelief of the petitioner's testimony, and continuously and unnecessarily rebuked the petitioner and his counsel, of which the Government in its answering brief on the appeal to the Court of Appeals states that there were 27 instances of rebuke of the petitioner. Those rebukes were based on the petitioner's unwillingness to answer without explanation questions such as "*Did you testify falsely* then or are you testifying falsely now?"

The Court of Appeals in the case at bar concludes that it sees "no impropriety of the questions", but does not even mention the continuous rebukes of the petitioner, nor the disbelief of petitioner's testimony indicated by the Trial Court. The decision of the Court of Appeals on this point is in conflict with its own decision in the case of *United States* v. *Brandt*, 2 Cir., 196 F. 2d 653, where it reversed a conviction because of the excessive examination of witnesses by the Trial Court, particularly where the questions appeared to underline inconsistencies in testimony or to elicit admissions bearing on the credibility of defense witnesses. The Second Circuit said in the *Brandt* case at page 656,

> "Beyond this the court actively cross-examined several witnesses, notably defendant Brandt himself, to a quite unusual extent. This interrupted the orderly

presentation of evidence by the defense. But further the questions appeared mainly to underline inconsistencies in the positions, or to elicit admissions bearing on the credibility, of defense witnesses."

The decision of the Court of Appeals in this case is also in conflict with the decisions of the Court of Appeals in other circuits. In *Peckham* v. *United States*, D. C. Cir., 210 F. 2d 693, the Court stated at page 702,

"* * * the excessive injection of the trial judge into the examination of witnesses, his numerous comments to defense counsel, indicating at times hostility, though under provocation, demonstrated a bias and lack of impartiality which may well have influenced the jury; that, considering these matters and others, examples of which are set forth in an appendix attached hereto, this court is barred from sustaining the judgment, as to the product of a fair and impartial trial. This necessitated reversal.

The writer of this opinion feels decidedly that it would have been preferable for the court to have restrained his interruption of the examination process. The Government was well represented and the extent of the judge's participation was not required by his obligation to maintain a firm and salutary control of the proceeding."

The petitioner contends in this case that the conduct of the Trial Court deprived him of a fair and impartial trial by reason of which his constitutional rights under the "due process" clause of the Fifth Amendment were violated. In *Coplon* v. *United States*, 191 F. 2d 749, the Court of Appeals, District of Columbia Circuit, said at page 760,

"A defendant in a criminal case may not legally be found guilty except in a trial in which his constitutional rights are scrupulously observed. No convic-

tion can stand, no matter how overwhelming the evidence of guilt, if the accused is denied the effective assistance of counsel, or any other element of due process of law without which he cannot be deprived of life or liberty."

As to Question 5:

It has been shown under Statement of Case that the newly discovered evidence completely altered the facts of those adduced from one witness and gave strong evidence that the testimony of the other witness was at least mistaken upon which alleged facts and testimony the jury based its verdict of guilt on the second count. It has also been shown that the Trial Court added to the testimony concerning putting whatever he took under the coat.

Within the two year period prescribed by Rule 33 of the Federal Rules of Criminal Procedure, Title 18, U. S. Code the defendant made a motion in arrest of judgment and for a new trial in "the interest of justice" upon the ground of newly discovered evidence. The Trial Court denied that motion in a decision which based the denial upon three grounds (Pet. App. C) (1) That the newly discovered evidence was available to the defendant and the Court "does not believe that he first learned of Johansen's testimony only after the trial", (2) That Johansen's "testimony, while different in some details from his testimony at the trial, is consistent with the latter and does not contradict or weaken it in any matter of substance" (R. 1617). (3) That the letter from Mr. Frier's office "relates only to matter involved in the third count" (R. 1616).

In respect to the first basis of the decision, can it be conceivable that the defendant, an attorney, had such

contradictory testimony of Mr. Johansen in his possession at the trial and did not use it in his defense? It is not too presumptuous to believe that an attorney would use every bit of possible evidence to defeat a conviction. Certainly also, if the defendant were not surprised at the trial by Mr. Frier's testimony and knew at the time of the existence of the letter and its import, he would have used it at the trial. The Trial Court should view the affidavit fairly to the accused and not merely look for grounds upon which to deny a motion of this type. In *Hamilton* v. *United States*, 140 F. 2d 679, the Court of Appeals, District of Columbia, held at page 681,

> "an affidavit of newly discovered evidence in a criminal case should be construed fairly to the accused."

In respect to the second and third basis of the denial of the motion, the defendant contends that the Trial Court misinterpreted the import of the newly discovered evidence so that its decision based on such conclusion constituted an abuse of discretion. That newly discovered evidence changed the facts upon which the jury based its verdict. Regarding the contention that the letter only relates to the third count is a clear misinterpretation of import. Certainly that letter refers to the merchandise that was involved in the third count and not the second count. That was the point raised, that Mr. Frier was confused about the subject matter of that telephone conversation if there were such a conversation. The defendant contends that any telephone conversation that Mr. Frier may have had concerned altogether different merchandise, the Marshal's sale merchandise, which was the subject of the stipulation under which possession was to be turned over to the Trustee, rather than the merchandise removed from the safe.

It has been held that the denial of a motion for a new trial is only reviewable upon the showing of the abuse of discretion on the part of the Trial Court. *United States*

v. *Johnson*, 2 Cir., 208 F. 2d 404, 405; *Crenshaw* v. *United States*, 6 Cir., 116 F. 2d 737, 741; *United States* v. *Yager*, 7 Cir., 220 F. 2d 795, 796. The next query is to determine what constitutes an abuse of discretion in the denial of such a motion. The Court of Appeals in the case at bar states in its opinion that the only value of the newly discovered evidence "is to impeach the witnesses in question". Naturally any newly discovered evidence that alters the facts testified to would impeach the witness giving that testimony. But the "interest of justice" requires that where the newly discovered evidence indicates that the testimony given at the trial was false or even mistaken it is an abuse of discretion not to grant a new trial. It has been so held in the Court of Appeals of other circuits.

In *Pettine* v. *Territory of New Mexico*, 8 Cir., 201 Fed. 489, the Court of Appeals said at page 494,

> "can it be truthfully said that it was not a gross abuse of discretion for the trial court to refuse to grant a new trial here and to refuse to exclude this false testimony from the minds of the triers of this fateful issue * * *."

In *United States* v. *Johnson*, 7 Cir., 149 F. 2d 31, the Court of Appeals ruled at page 43,

> "It is our conclusion that the proof offered in support of the original and amended motion, with the attending circumstances, unerringly points to the fact that Goldstein's trial testimony was false. The finding of the trial court to the contrary was, in our opinion, an abuse of discretion."

See also *Benton* v. *United States*, D. C. Cir., 188 F. 2d 625, 627.

In respect to the fact that the Trial Court found that though Mr. Johansen's testimony differed from his trial testimony, it was consistent with the latter and misinterpreted the import of the letter referred to from Mr. Frier's office is in conflict with the decisions of the Court of Appeals in other circuits. In *Hamilton v. United States*, D. C. Cir., supra, the Court said at page 682,

> "* * * we think it was an abuse of discretion when the trial court indulged in a hypothetical interpretation of the statement of newly discovered evidence in order to make it consistent with the testimony it was intended to rebut."

In *Smith v. United States*, 4 Cir., 281 Fed. 696, the Court of Appeals ruled at page 698,

> "In this case, having due regard to the weight properly attaching to the ruling on a motion for a new trial, we can but believe that the trial court misapprehended the facts on the original testimony, and, in our judgment, took an erroneous view of the purpose and effect of the after-discovered evidence."

As to Question 6:

A number of procedural errors at the trial have been pointed out.

(a)

The Trial Court forwarded to the jury the indictment which contained the first count not directed against petitioner in which a co-defendant, not on trial, was charged with the crime of using the mails to defraud in connection with the false financial statement to the extent of $230,000. The jury may have thought that petitioner was involved in that first count not being versed in legal

principles. Or the jury may have taken the allegations contained in that first count as proof that the petitioner had knowledge of facts contained in that statement when mailed. Or the jury may have taken those allegations as proof of the financial condition of Berkeley Jewelers, Inc. at the time of the alleged conspiracy or a combination of such proofs. In any event the Government would have no right to admit the first count into evidence at the trial. Under such circumstances the jury had no right to read that first count or even have the opportunity to read it. Under those circumstances that first count should not have been forwarded to the jury.

In the case at bar, the Court of Appeals by-passed that question altogether. That is in conflict with the decisions of other circuits. In *United States* v. *Dressler*, 7 Cir., 112 F. 2d 972, the Court of Appeals said at page 977,

> "It is inconsistent with our traditional conception of a fair trial to permit any information to go to a jury which might influence the jury to convict a defendant for any reason other than that he is guilty of the specific offense with which he is charged."

In *Ogden* v. *United States*, 7 Cir., 112 Fed. 523, the Court of Appeals said at page 527,

> "Trial by jury is properly surrounded by every reasonable safeguard to insure the absence of improper influence that might operate upon the minds of the jurors, * * *."

Nor is it necessary to prove that the jury did in fact read the document improperly given it. In *United States* v. *Grayla*, 7 Cir., 185 F. 2d 273, the Court of Appeals said, at page 275,

> "True, it is possible that the defendant suffered no harm by reason of the affidavit going to the jury;

in fact, it could be that the affidavit was not seen by a single member of the jury. On the other hand, it could and it might have been used effectively in persuading jurors otherwise doubtful or opposed to conviction to agree to a verdict favorable to the government. And it is sufficient to require reversal if, in our judgment, the error might have operated to the substantial injury of the defendant. See United States v. Dressler, 7 Cir., 112 F. 2d 972, 978 (and cases cited)."

(b)

Concerning the refusal of the Trial Court to admit into evidence the statement made by the petitioner after his arrest on the crime charged in the second count, which statement was made competent by the use of extracts by the Government on cross-examination and concerning which the Court of Appeals in the case at bar held was inadmissible for it "must be competent before it will be considered", such statement was made competent under the "Completeness Doctrine" or "Opening the door Doctrine". The fact that it is a self-serving document should not be the cause of its exclusion after the Government "opened the door" to its admission by cross-examining the petitioner on extracts of that statement. The document was relevant to the issues in the case. The statement contained facts about which the petitioner testified at the trial. The ruling by the Court of Appeals in the instant case is in conflict with its own decisions as well as with the decisions of other circuits.

In *United States* v. *Corrigan*, 168 F. 2d 641, the Court of Appeals, Second Circuit, said at page 645,

> "The doctrine of 'opening the door' is an application of the principle of 'completeness'; that is, if one party to litigation puts in evidence part of a document, or

a correspondence or a conversation, which is detrimental to the opposing party, the latter may introduce the balance of the document, correspondence or conversation in order to explain or rebut the adverse inferences which might arise from the fragmentary or incomplete character of the evidence introduced by his adversary. The rationale of the doctrine of completeness has been stated by Professor Wigmore: 'To look at a part (of an utterance) alone would be to obtain a false notion of the thought. * * * One part cannot be separated and taken by itself without doing injustice, by producing misrepresentation'; and again, 'possibilities of error lie in trusting to a fragment of an occurrence without knowing what the remainder was'; consideration of the whole is needed 'to avoid the danger of mistaking the effect of a fragment'."

In *Affronti* v. *United States*, supra, 145 F. 2d 3, the Court of Appeals, Eighth Circuit, said at page 7,

"Another exception to the general rule is that if some portions of a statement made by a witness are used on cross-examination against him, other portions of the statement which are relevant to the subject matter about which he was cross-examined may be introduced in evidence to meet the force of impeachment."

If the Government saw fit to make use of portions of that statement, it should not object to the balance of the statement on the same subject from going into evidence. It must also be taken into consideration that even if the portions of the statement used are not inconsistent with the testimony of the witness, the use of such statement on cross-examination may give the impression of inconsistency to the lay jury.

(c)

It has been pointed out in the STATEMENT OF CASE that the Assistant United States Attorney in his summation to the jury read certain extracts of purported testimony given by the defendant to the Grand Jury. Although the prosecuting attorney cross-examined the defendant on some of the questions propounded and answers given by the defendant before the Grand Jury, some of which questions and answers the defendant stated that he had no recollection of those questions and answers purportedly given four years earlier and although the Government never offered the Grand Jury minutes into evidence, yet the prosecuting attorney read some of those extracts to the jury during his summation. True, the prosecuting attorney asked that defense counsel stipulate on the record that if the Grand Jury stenographer were called as a witness, he would testify to the accuracy of the minutes, but that stipulation is only a prelude to the admission of the document into evidence. However, the Government *never did* offer those Grand Jury minutes into evidence. Hence the Government should have been precluded from reading any excerpts of those minutes to the jury. The Court of Appeals refers to that point in its opinion and says,

> "Switzer alleges a number of errors with regard to the summations and instructions. The Assistant United States Attorney in his summation read part of Switzer's testimony given before the Grand Jury. Switzer previously had been confronted with it on cross-examination; and his counsel stipulated that the Grand Jury stenographer, if called as a witness, would testify to the accuracy of the excerpts. Thus there was no error in allowing the prosecutor to use that part of the minutes in the summation."

That is in conflict with the decisions of the Court of Appeals in other circuits. In *Tashjian* v. *Boston & Maine R. R.*, 80 F. 2d 320, the Court of Appeals, First Circuit, stated at page 321 in referring to the summation of counsel,

> "It must be confined to the evidence • • •."

In *Kline* v. *United States*, 41 F. Supp. 577, a statutory court consisting of three judges, one of whom was a judge of the Circuit Court, District of Nebraska, the Court aptly expressed the rule involved by stating at page 582,

> "The general rule of law is that nothing can be treated as evidence that is not introduced as such."

In *London Guarantee & Accident Co.* v. *Woeifle*, 83 F. 2d 325, the Court of Appeals, Eighth Circuit, said at page 432,

> "In the trial of cases to a jury in the federal courts, the arguments of counsel must be confined to the issues of the case, the applicable law, *the pertinent evidence*, and such legitimate inferences as may properly be drawn therefrom."

(d)

During the course of the trial, the Government questioned the five alleged co-conspirators concerning their testimony before either the Referee in the 21a examinations or before the Grand Jury. Each of these five witnesses were improperly asked questions which called for conclusions rather than for facts in connection with the falsity of their testimony at those previous proceedings, in four cases directly by the prosecuting attorney and in one case by the Trial Court who took over the questioning

of that witness at that point. Those improper questions and the answers thereto follow:

Witness Faskow:

"Q. Did you tell the Referee in bankruptcy anything that was not true? A. Yes, sir.

Mr. Stim: I object to that, your honor.

The Court: Overruled.

Mr. Stim: How is it binding upon us?

The Court: Overruled." (R. 143)

Witness Shulman:

"Q. Did you subsequently testify as a witness before the grand jury? A. Yes, sir. I did.

Q. Did you testify truthfully? A. No, sir." (R. 488)

Witness Mintz:

"Q. Did you tell the truth before the grand jury? A. At first I didn't." (R. 576)

Witness Shear:

"Q. Did you subsequently go into the grand jury and testify? A. Yes, sir.

Q. Was your testimony true or false? A. It was false, sir." (R. 684)

Witness Fellerman, after a discussion of a conversation with the witness, Mintz, and not the defendant:

"The Court: He (Mintz) told you what?

The Witness: He told me what I should say in the grand jury, and I said it, but I later went to the grand jury and took back that testimony and told the truth.

The Court: What it was you told the grand jury that was false?

The Witness: Yes, sir." (R. 601)

All of those questions, except in the case of the witness, Fellerman, were propounded after the respective witnesses

testified that they had conversations with the defendant about their appearance at those other proceedings giving the clear inference that their false testimony was at the urging of the defendant, except in the case of the witness, Fellerman. The Government did not even bother to point out any particular question and false answer that was given at those other proceedings. It is noted that Defense Counsel objected to the first of that line of questions. It has been held that once an objection has been made, it applies to similar questions without the necessity of repetition. In *Union Electric & Power Co.* v. *Snyder Estate Co.*, 65 F. 2d 297, the Court of Appeals, Eighth Circuit, said at page 303,

> "No specific objection was made to this last question but an objection once made to a question preserves the objection to similar questions without the necessity of repetition."

For the Trial Court to permit five witnesses to give such conclusions under the inference that such false testimony was given under the direction or urging of the defendant without giving any conversation or the substance of any conversation upon which such an inference can be justified, particularly when such conclusions are not backed up with specific pointed questions and answers and the true facts involved in each instance, must have had a profound effect upon a lay jury that is unfamiliar with the rules of evidence. Furthermore, the Trial Court, further impressed those conclusions on the mind of the jury by stating in its charge at page 1417 of the record,

> "You may recall that they testified and each of them said that he testified falsely before the grand jury."

Definitely, such conclusory answers to improper questions were prejudicial to the defendant, especially when such conclusions were not based upon any factual testimony.

The Court of Appeals stated in its opinion,

> "Switzer next claims that he was prejudiced by testimony of prosecution witnesses that he told them to testify falsely when appearing before the Referee in Bankruptcy or the Grand Jury. He contends that this was improper, because it permitted the government to impeach its own witnesses and because the questions called for conclusions. Those questions were proper, as they were relevant to establish Switzer's criminal intent and were not asked for the purpose of impeachment."

The Court of Appeals fails to discuss the impropriety of the questions as calling for conclusions and only rules on the matter of impeachment. The objection on the basis of conclusion is in direct conflict with decisions of the Court of Appeals of other circuits and with this Court. In *Walker v. McLoad*, 204 U. S. 302, 27 S. Ct. 293, 51 L. Ed. 495, this Court said at page 310,

> "The statement that the chief ratified his action was a mere conclusion of law. It gave no facts upon which such alleged ratification was based, and was clearly inadmissible as proof of ratification."

See also *Public Opinion Pub. Co. v. Jenson*, 8 Cir., 76 F. 2d 494, 496.

(c)

Another incident was that a vital witness for the defense, who had been under suspoena, forwarded to the Trial Court a registered letter which contained a statement from a physician in the City of Boston in which it was stated that such proposed defense witness was under the physician's care for an acute attack of inflamed hemorrhoids and that such proposed witness would be unable to leave Boston until the end of that week and yet the Trial Court did not grant any continuance for the pur-

pose of having that prospective witness testify. That letter was received on Tuesday, April 17, 1956, the third to the last day of the trial. Despite the fact that Defense Counsel pointed out to the Court how important the testimony of that witness was to the defense, the Trial Court itself, rather than the prosecuting attorney, argued with Defense Counsel against any delay in the trial to await that person's appearance. Not only was no stipulation entered into as to what the proposed witness would testify to as requested by Defense Counsel but even the request to have the Government stipulate as to the facts contained in a written document already in evidence (Defendant's Exhibit Z) was refused by the Government. The only concession made to the defendant was a stipulation on the record to the effect that a subpoena was served by the defendant upon Mr. Shapiro in the City of New York, which called for his appearance on April 17; that the Court received a special delivery, registered letter which contained the said statement from the physician, which statement was read to the jury; that his absence was not due to the fault of either the Government or the defendant and that both desired his presence in court. The latter statement that *both* desired his presence was not consistent with a previous statement of the Government that the Governmen did not desire to call Mr. Shapiro to the stand. The above incident took thirteen pages of the record to report (R. 1054-1066) in which the Trial Court adopted the role of prosecutor in arguing against a delay rather than its judicial role after argument by counsel for both sides. The Court of Appeals failed to discuss this point in its opinion.

(f)

Another incident, though not urged in the points on appeal to the Court of Appeals, but which was brought to that Court's attention at the argument, concerned the failure of one of the Government's witnesses, Jack Shulman,

to produce certain records and documents pursuant to a subpoena duces tecum served by the defendant, without the Trial Court compelling him to do so. That witness did not claim that he did not possess those records and documents but claimed that he did not have sufficient time to gather them. That witness testified early in the trial and the incident is in the record. Of particular importance to the defendant was the production of the trust receipt agreements and related matters which were so vital to the defense of the "independent crime". The Court of Appeals opinion does not discuss this matter.

Conclusion

It is respectfully submitted that the various questions raised in this petition are of such importance in the administration of criminal law that there should be an authoritative determination of the same by this Honorable Court. Accordingly the petitioner asks that this Court issue a writ to review the judgment of affirmance herein.

Respectfully submitted,

WALTER F. MALONEY,
LLEWELLYN A. LUCE,
Attorneys for Petitioner.

APPENDIX A

Judgment of Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 28th day of January one thousand nine hundred and fifty eight.

Present HON. CHARLES E. CLARK,
Chief Judge

HON. LEONARD P. MOORE,
Circuit Judge

HON. VINCENT L. LEIBELL,
District Judge
Circuit Judges

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

MORRIS H. SWITZER,
Defendant-Appellant

ALBERT B. FASKOW, JACK SHULMAN & IRVING SHEAR,
Defendants

Appendix A

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

APPENDIX B

Order of Extension of Time to File Petition for Writ of Certiorari

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1957.

MORRIS H. SWITZER,

Petitioner,

vs.

UNITED STATES OF AMERICA

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 25th, 1958.

(S) JOHN M. HARLAN
Associate Justice of the Supreme Court of the United States.

Dated this 18th day of March, 1958.

APPENDIX C

Decision–Opinion of District Court on Motion in Arrest of Judgment and for a New Trial

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

C 138–189

UNITED STATES OF AMERICA,

v.

MORRIS H. SWITZER, et al.,

Defendants.

McGOHEY, *D. J.*

The defendant, a lawyer, appearing in his own behalf, moves in arrest of judgment and for a new trial on the ground of newly discovered evidence.

On April 22, 1956, a jury found the defendant guilty on counts two and three of the instant indictment, after a trial lasting eleven days, in which he testified in his defense. He was there represented by privately retained counsel.

He was sentenced to a prison term of 18 months on the third count. A similar term was imposed on the second count but execution thereof was suspended and he was placed on probation for three years to commence at the conclusion of the prison term.

He was granted leave to appeal in forma pauperis and has done so. This motion was made pursuant to permission by a Judge of the Court of Appeals without a formal order of remand.

The second count charged that after Berkeley Jewelers, Inc. had been adjudicated a bankrupt on February 20, 1950, and a duly elected trustee had qualified on April 6, 1950, the defendant Switzer, during the month of May, 1950, unlawfully concealed from the trustee property belonging to the bankrupt estate.

The third count charged that beginning in October, 1949, Switzer and others, knowing that an involuntary petition would be filed against Berkeley Jewelers, Inc. and that the latter would lack sufficient assets to satisfy creditors' claims, conspired to effect a fraudulent transfer of its property prior to the filing of the petition.

Switzer was the attorney for Berkeley Jewelers, Inc. which conducted a retail business selling jewelry, clocks, radios and other electric appliances at discount. It had premises on the second floor of a building at 44 East 29 Street in Manhattan where its merchandise was displayed and stored. Prior to the adjudication of bankruptcy on February 20, all of the bankrupt's merchandise, except some pieces of jewelry which, being in a locked safe, were apparently overlooked, was removed from the premises under the following circumstances.

On December 15, 1949, Faskow, the bankrupt's president, signed four confessions of judgment in the amount of $1,000 each, in favor of money lenders to whom the bankrupt owed $4,000 on loans, at high interest, made several months before. Thereafter judgments were entered and executions issued, pursuant to which a sale was noticed. A relative of Switzer acted as attorney for the judgment creditors. Prior to the sale, the more valuable items of merchandise consisting of diamond

jewelry and gold rings and watches were removed at night to warehouses and also to private homes, of which some belonged to friends of Switzer. Furthermore, most of the remaining merchandise was removed from the shelves and display cases in the showroom and placed in a storeroom. On the day of the sale the door to the storeroom was closed and there was displayed to prospective buyers only that part of the bankrupt's stock which was on display in the showrooms. The safe, which was subject to a chattel mortgage, was not included in the sale. Although at first it appeared that there might be competition in bidding, this did not materialize and the entire lot of merchandise went for $1,200 and some fixtures for $100. The $1,300 had been furnished by one of the judgment creditors. The successful bidder turned out to be a young man from Massachusetts who had never been in the kind of business conducted by the bankrupt. He too was a relative of Switzer. After the sale there was removed from the premises, purportedly on the successful bidder's behalf, not only the merchandise which had been displayed at the sale but also that which had been sequestered in the storeroom. The value of all the removed merchandise greatly exceeded $1,300. The transactions above summarized constituted the basis of the conspiracy charge in the third count of the indictment.

Switzer concedes that some time in May, 1950 he, with the permission of the trustee's attorney, visited the premises in order to try to sell the safe; that he removed from the safe and brought to his own office several trays of jewelry; and that these were not turned over to the trustee or to his attorney prior to Switzer's arrest which occurred on May 31, 1950. The removal and retention of this property constituted the basis of the charge of concealment in the second count.

Switzer testified he did not intend to conceal this property; that on the contrary he promptly advised the trustee's attorney of what he had found in the safe and had brought to his office and that he would turn it over to the trustee; that his failure to do so prior to his arrest resulted solely from his preoccupation with other matters. The jury obviously did not credit this testimony.

Switzer concedes, what is in any event clear, that "the second and third counts are unrelated and independent crimes" and that the evidence alleged to be newly discovered relates only to the second count. Nevertheless, he urges, this evidence might help to bring about acquittal on the third count also, for reasons stated in his affidavit in support of this motion. There, after discussing the testimony of the witnesses Frier, Johansen and Faskow as to the matters involved in the second count, the defendant states: "The newly discovered evidence which I presently possess, in my opinion, overcomes that adverse testimony, inferences and conclusions. At least it is so strong that it taints what the Jury heard to such a degree that had the Jury heard this newly discovered evidence, it would have in all probability arrived at a verdict of acquittal. It certainly would have raised a reasonable doubt in the mind of the Jury that I was guilty as charged. It is a fair assumption additionally that had the Jury reached a not guilty verdict on the second count, it could have conceivably affected the verdict on the third count. The Jury could possibly have thought that if I were guilty of committing one crime with a small amount of merchandise involved, I was also guilty of the second crime which involved considerably more merchandise."

Frier was the attorney for the trustee. Johansen was the elevator operator at 44 East 29 Street. Faskow, president of the bankrupt, was a codefendant who pleaded guilty.

Frier testified that some time between April 6, when the trustee qualified, and the beginning of May, Switzer told him "there was nothing in the safe or in the premises that was the property of the trustee"; that some time early in May Switzer called him and said he had a prospective buyer for the safe, whereupon Frier said he would call the superintendent of the 29 Street building and tell him there was no objection to allowing Switzer to visit the premises formerly occupied by the bankrupt; that some time later he called Switzer on the telephone and told him he had learned that Switzer had removed some merchandise from the premises; that Switzer denied this; that when Frier called a second time and said he had learned that Switzer "had taken three or four trays allegedly containing certain jewelry and put them under his coat and took them in the car," Switzer admitted that he had taken them, but they were of little value and he would write Frier and would turn over the property to the trustee; that they were not turned over.

The trial transcript records Johansen as having testified that he knew Switzer, having seen him many times prior to the bankruptcy; that some time in May Switzer came to the premises alone; that "he said to me he wants to go up to the safe; he has the combination and he wants to take out what is in there in the safe"; that "he walked down to the safe, he opened the safe, I was about 20, 25 feet away from him, and he took out whatever was in there, in the safe, and he came up to me and I took him down."

Faskow testified it had been customary to keep the more valuable jewelry and watches in the safe, at least at night.

Switzer in his affidavit in support of the motion asserts that it was Johansen who testified that Switzer put under

his coat what he had taken from the safe. According to the transcript it was not Johansen who so testified but Frier. However, Switzer's counsel in summation and the Court in its charge, incorrectly attributed that testimony to Johansen rather than to Frier. Switzer asserts that his recollection is that Johansen so testified. Accordingly he contends the transcript is in error; that the "omission of that testimony [from the transcript of Johansen's testimony] was an error on the part of the Court Reporter." This contention is crucial to Switzer's present claim. The first question therefore is whether the transcript as furnished by the reporter is correct. The reporter was called and sworn. He read from his original notes. They contained only what appears in the transcript. The reporter is a man of extensive experience in this court. I have no reason to doubt either his competence or integrity, and Switzer's cross-examination did not develop any basis for doing so. I find that the reporter correctly recorded and transcribed Johansen's testimony. My trial notes agree with the transcript.

The evidence claimed to be newly discovered consists of (a) testimony by Johansen in a 21a examination before the Bankruptcy Referee, in which Johansen did not say that Switzer put under his coat what he removed from the safe; and (b) a letter addressed to Switzer by a lawyer in Frier's office on June 13, 1950.

On the argument of this motion Switzer admitted he had in court throughout the trial his file containing this letter. It is entirely clear therefore that the letter is not newly discovered evidence. Moreover, as Switzer concedes, it relates only to matter involved in the third count. Switzer's theory as to how this letter might have been used to help his defense to the second count is set forth in pp. 12 to 17 of his affidavit. It is quite involved, wholly unpersuasive and is rejected.

Appendix C

Switzer claims it was only when he began to prepare his appeal that he first learned that Johansen had testified before the Referee. It is difficult to give credence to that claim. Switzer continued to serve as attorney for the bankrupt until long after his arrest on May 31, 1950. He had the strongest possible reasons to keep informed as to all that occurred in all proceedings before the Referee. It is altogether incredible that he failed so to inform himself. He says now that, although prior to the trial and after Faskow had decided to plead guilty he secured from Faskow's attorney a set of minutes of the 21a examinations before the Referee, these contained no testimony by Johansen; that he first learned Johansen had testified there when he examined the transcript of the hearings in the Bankruptcy Court's file while preparing his appeal. The filed transcript of the hearings has been examined by me. It contains Johansen's testimony under the date July 24, 1950. There is no appearance noted for Switzer on that day. However, the transcript does show that Johansen had been sworn as a witness on June 28 and directed to appear for examination on July 24, and that on June 28 Switzer was present as attorney for the bankrupt. Thus it is clear that Switzer knew or had reason to know that Johansen was to be examined on July 24. Again it is altogether incredible that Switzer, who was then charged with the concealment, either failed to be present when Johansen testified or to take steps to learn what his testimony was. I saw and heard Switzer testify at the trial. The jury did not credit him there nor did I. I do not here. I do not believe that he first learned of Johansen's prior testimony only after the trial. Moreover that testimony, while different in some details

APPENDIX D

Opinion of Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 124—October Term, 1957.

(Argued November 14, 1957 Decided January 28, 1958.)

Docket No. 24795

UNITED STATES OF AMERICA,

Appellee,

—v.—

MORRIS H. SWITZER,

Defendant-Appellant.

Before:

CLARK, *Chief Judge*,

MOORE, *Circuit Judge*, and LEIBELL, *District Judge*.

Appeal from the United States District Court for the Southern District of New York, John F. X. McGohey, *Judge*.

Morris H. Switzer appeals from his conviction of violation of the bankruptcy laws and of conspiracy. Affirmed.

Appendix D

MORRIS H. SWITZER, New York City, appellant, *pro se*.

GABRIEL B. SCHWARTZ, Sp. Asst. to U. S. Atty., S. D. N. Y., New York City (Paul W. Williams, U. S. Atty., New York City, on the brief), *for appellee*.

CLARK, *Chief Judge*:

Defendant, an attorney, appeals from convictions of the crimes of concealing assets from a trustee in bankruptcy, 18 U. S. C. §152, and conspiring to transfer the assets of one corporation to another in contemplation of bankruptcy and with intent to defeat the National Bankruptcy Act, 18 U. S. C. §371 and 18 U. S. C. §152. He also appeals from an order denying his motion for a new trial on the ground of newly discovered evidence.

There was evidence before the jury that Switzer's client, a corporation called Berkeley Jewelers, Inc., borrowed substantial sums from money lenders who also were represented by Switzer. The loans were necessary because the corporation was incurring large losses in its expanded "discount" operations. In December 1949, Switzer, who was well aware of the corporation's financial deterioration, proposed a plan whereby the bulk of its inventory would be transferred to a new corporation to be managed for the benefit of those creditors who were also Switzer's clients. The new corporation was then to continue the profitable portion of the old corporation's business. The persons involved agreed to the plan, and Switzer prepared confessions of judgment to the favored creditors. Prior to an arranged judicial sale much of the valuable inventory was removed from the old corporation's premises; and consequently at the sale, conducted by a "friendly" city mar-

shal, one of the conspirators was successful in purchasing its property at a low figure. The valuable inventory previously removed was then sold for the benefit of the favored creditors and Switzer; and the property purchased at the sale went to the newly organized corporation, which continued to pay the old corporation's debt to one of the creditors with whom Switzer was associated.

A little over one month later the old corporation, still represented by Switzer, consented to an adjudication of bankruptcy. After the appointment of a trustee, Switzer found out that some jewelry remained in the company's safe. He thereupon removed the jewelry and refused to return it to the trustee, although the trustee made demand for it. A portion of the jewelry was recovered upon his arrest.

Switzer was tried upon the second and third counts of an indictment, the only ones directed against him. Of these, Count 2 charged him with concealing from the trustee the jewelry he removed from the bankrupt's safe and refused to return. And Count 3 charged him with conspiring to transfer the old corporation's assets with intent to defeat the Bankruptcy Act. This relates to the whole scheme to remove the old corporation's assets from the reach of other than the favored creditors.

Switzer raises a number of points on appeal. He first asserts that the conspiracy count of the indictment was defective. It alleged a conspiracy to transfer the bankrupt's property illegally. It made no reference to concealment. This, defendant claims, rendered the indictment fatally defective, despite the fact that a conspiracy indictment need not describe the substantive crime with the particularity of an indictment for that offense. *Wong Tai* v. *United States*, 273 U. S. 77. The argument is founded on the decision in *United States* v. *Posner*, D. C. S. D. N. Y., 3 F. Supp. 252, wherein an allegation of concealment was held to be

an essential element, even though the statute used the words "transfer" and "conceal" in the alternative. The court reasoned that paragraph 1 of 18 U. S. C. §152 must be read in conjunction with paragraph 6. Paragraph 1 prohibits a person contemplating bankruptcy from concealing his assets, but nowhere is he prohibited from transferring them. Since a principal is not prohibited from transferring assets, an agent ought not to be so prohibited, for Congress would not have intended to apply a more stringent requirement to agents than to principals. Therefore, that court concluded that paragraph 6 must mean that an agent must conceal, or conceal and transfer, before criminal liability attaches.

This argument has been considered and rejected by the Courts of Appeals of the Seventh and Tenth Circuits. These decisions reason that the intent of Congress was to prevent the defeat of the bankruptcy statute and that this intent is best applied by adopting a literal reading of the statute. *United States* v. *Shapiro*, 7 Cir., 101 F. 2d 375, certiorari denied *Shapiro* v. *United States*, 306 U. S. 657; *Viles* v. *United States*, 10 Cir., 193 F. 2d 776, certiorari denied 343 U. S. 915. Although the language of the statute in question has changed, these three cases and the instant case all interpret the language of the statute as it now reads.

It is clear that the latter interpretation should be followed because the actual intent of Congress is best served by prohibiting either transfer or concealment, for either one may defeat the purpose of the Act. The difference between paragraphs 1 and 6 is more apparent than real, for a fraudulent transfer by a principal could be charged as a fraudulent concealment and the evidence of transfer would justify a finding of concealment.

Defendant also claims that the government failed to establish a *prima facie* case. He urges, with respect to Count 2, that it never proved that there was a trustee in bankruptcy from whom defendant could conspire to trans-

fer property or that the property in question was the property of the bankrupt estate; and with respect to the conspiracy count, he contends that the government failed to prove that the transfer was fraudulent. These arguments are without merit, for the government proved that a trustee was elected by the creditors, that his appointment was approved by the referee, and that the amount of his bond was fixed. The trustee then testified that he, in fact, was the trustee and acted as such. Still later Switzer testified that there was a trustee. We believe the government adequately established this fact. In addition, there was no dispute that the jewelry in question was in the possession of the bankrupt, specifically in its safe. It is immaterial whether this property was owned by the bankrupt, bailed to the bankrupt, or previously sold by the bankrupt and awaiting delivery; for in any of these events the bankrupt had a property interest in the jewelry, and for purposes of the statute, 18 U. S. C. §152, it was property of the bankrupt corporation. Defendant's last contention is based on his view of the evidence. There is little doubt but that from the testimony at trial (which included the testimony of Switzer's coconspirators on behalf of the government) the jury could have concluded that Switzer, with intent to defeat the bankruptcy law, knowingly and fraudulently transferred property of the old corporation to the new corporation and to the favored creditors in violation of 18 U. S. C. §152.

Switzer claims that numerous errors denied him a fair trial. He alleges that three errors occurred during the presentation of the prosecution's case. The first concerns evidence which was presented to show not only that defendant conspired to transfer property, but also that he actually transferred it. Switzer claims that this is evidence of an independent crime not charged in the indictment and also constituted a variance between pleading and proof so as to expose him to double jeopardy. But the evidence was

clearly admissible to show his intent and the absence of mistake, both of which had been raised by the defense. Switzer was not indicted for the crime of fraudulent transfer; and he cannot protest against a future prosecution for that offense. The pleading alleged conspiracy to transfer and the evidence established that conspiracy.

Switzer next claims that he was prejudiced by testimony of prosecution witnesses that he told them to testify falsely when appearing before the Referee in Bankruptcy or the Grand Jury. He contends that this was improper, because it permitted the government to impeach its own witnesses and because the questions called for conclusions. These questions were proper, as they were relevant to establish Switzer's criminal intent and were not asked for the purposes of impeachment. One of the witnesses was allowed to summarize his conversation with Switzer because he could not remember the precise questions, but only the gist of the conversation. But the other witnesses remembered the precise statements of the defendant, and it was only after the prosecutor had tried diligently to bring out the exact conversation that the court permitted the first witness to summarize what transpired. As for the objection that the question was double, and therefore the answer was unclear, the defense had opportunity to clarify the point on cross-examination.

Switzer's third complaint concerns his absence from the courtroom during the trial. He left the courtroom for about two minutes while Faskow, president of the bankrupt and a coconspirator, testified that he told defendant of the company's precarious condition in December 1949—the month in which Switzer proposed the elaborate plan to transfer the company's assets. But there is no irregularity here, for Switzer was absent at his own request and the judge continued only after obtaining express permission from defense counsel, who heard Faskow's answer and developed it on cross-examination. In addition, other wit-

nesses, whom defendant did hear, testified that he had told them of the insolvency in December 1949. Furthermore, there was no objection raised at the trial and Switzer was fully aware that the facts had been presented to the jury. See *Parker* v. *United States*, 4 Cir., 184 F. 2d 488.

Switzer alleges that a number of errors occurred during the presentation of his case. He claims that the trial court so repeatedly rebuked him and his counsel that it must have had prejudicial effects on the jury. But this must be considered in proper perspective. The trial lasted eleven days, and there were some 1,470 pages of transcript. The jury had ample opportunity to observe defendant while he was on the witness stand, for his testimony accounted for 399 pages of transcript. Repeatedly he was evasive and unresponsive, and the trial judge was obliged to take an active part to keep the proceedings in proper channels. Most of the judge's questions were directed toward that end. Moreover, he cautioned the jury that his instructions to Switzer had nothing to do with Switzer's guilt or innocence.

Switzer contends that it was error to allow the prosecutor to make use of his pre-trial statement during cross-examination and then refuse a defense motion to admit the document as a whole, even though many parts were irrelevant, self-serving, and did not rehabilitate him. But the defense may not introduce any statement of defendant simply because the prosecutor questioned defendant concerning its contents. The statement, like any other evidence, must be competent before it will be considered.

Switzer lists some 920 questions which he claims the court asked to his prejudice. He urges that the extensive examination by the court showed that the court adopted the role of prosecutor and further that the examination must have created an impression in the minds of the jury that the court disbelieved Switzer's testimony. A trial judge has a duty to elicit facts necessary to a clear presentation of the issues, *Pariser* v. *City of New York*, 2 Cir., 146 F. 2d 431;

but he must maintain impartiality and a courtroom atmosphere in which guilt or innocence may be solely and fairly tested. *United States* v. *Brandt*, 2 Cir., 196 F. 2d 653, 656. In the latter case we held that the 900 questions asked by the trial judge denied the accused a fair trial because they "were not of the form to elicit information or direct the trial procedure into proper channels." Moreover, they "cut into the presumption of innocence." There, the trial court actively cross-examined several witnesses, noticeably the defendant, even during direct examination; and the questioning appeared mainly to underline inconsistencies in their positions or to elicit admissions bearing on their credibility. Under the *Brandt* case whether a given question or line of questioning is designed primarily to clarify issues and elicit facts or to underline inconsistencies and elicit admissions must be decided in the light of the whole trial, for each question is usually not objectionable on its face.

Here, as the voluminous transcript shows upon examination, most of the trial judge's questions were designed to clarify the testimony and point out its relation to former testimony. The court uniformly allowed ample time for the explanation of any resulting inconsistencies and avoided personalities whenever possible. Moreover, the court did not address itself to the credibility of any witness, nor did it remark on the weight to be given to any particular piece of evidence. We see no impropriety in the questions.

Switzer alleges a number of errors with regard to the summations and instructions. The Assistant United States Attorney in his summation read part of Switzer's testimony given before the Grand Jury. Switzer previously had been confronted with it on cross-examination; and his counsel stipulated that the Grand Jury stenographer, if called as a witness, would testify to the accuracy of the excerpts. Thus there was no error in allowing the prosecutor to use that part of the minutes in the summation.

Switzer claims that it was error not to call him into the

robing room while the court ruled on requests to charge. But Rule 30 of the Federal Rules of Criminal Procedure, which provides that parties may file written requests for instructions and that the court shall inform counsel of its proposed action on the requests, does not require the court to inform a defendant represented by counsel of its rulings. Nor does it require that the defendant be present while requests are made. Moreover, this defendant certainly was not prejudiced, because he had an opportunity to propose, and did propose, additional instructions later in open court, after which he indicated that the instructions were satisfactory to him. Neither *Ah Fook Chang* v. *United States*, 9 Cir., 91 F. 2d 805, nor *Shields* v. *United States*, 273 U. S. 583, is applicable in this case as Switzer contends. In those cases the court gave additional instructions to the jury after it had retired and out of the presence of the defendant and his counsel. Thus the defense had no opportunity to correct any errors. Here, however, the discussion took place not between the court and the jury, but between the court and counsel; and there was ample opportunity to correct any error and raise objection.

Switzer alleges numerous errors in the charge despite the fact that he took no exceptions and his counsel accepted the charge as satisfactory. He contends that the court gave a one-sided view of the evidence. But the record shows that the court was summarizing uncontroverted evidence which, unfortunately for Switzer, was hostile to him. This was hardly prejudicial to any of his rights. Switzer also claims that the instructions allowed the jury to find him guilty of the conspiracy count if it believed that he transferred *or concealed* the property in question, and that the court failed to instruct the jury that it must find that the object of the conspiracy was the object alleged in the indictment. But this contention is without merit, because the judge did charge that, in order

to convict, the jurors must find that the "conspirators * * * came to a mutual understanding to accomplish an unlawful purpose" which he had already defined as knowingly and fraudulently transferring or concealing property of a bankrupt with intent to defeat the bankruptcy law. The court then specified the necessary elements in this case by stating that, in order to find Switzer guilty, the jury must find "that he conspired with others in contemplation of bankruptcy knowingly to transfer property of the corporation." This general instruction, which succinctly listed the elements of the offense, was sufficient, especially as Switzer made no objection. *United States* v. *Capitol Meats, Inc.*, 2 Cir., 166 F. 2d 537, 539, certiorari denied *Capitol Meats, Inc.* v. *United States*, 334 U. S. 812.

Lastly Switzer urges that the trial court should have granted a new trial on the basis of newly discovered evidence. After trial the defendant discovered among his files a letter over five years old from one of the prosecution witnesses which tended to indicate that the witness may have been confused as to certain testimony concerning certain dates and property. Switzer also learned that another prosecution witness had made a pre-trial statement which differed slightly from the witness' testimony at the trial. Even if this evidence is considered as newly discovered, its only value is to impeach the witnesses in question. This is not a sufficient reason to grant a new trial. *United States* v. *Hiss*, D. C. S. D. N. Y., 107 F. Supp. 128, affirmed 2 Cir., 201 F. 2d 372, certiorari denied *Hiss* v. *United States*, 345 U. S. 942.

Switzer's other allegations have been considered and rejected. They are too insubstantial to warrant discussion.

Conviction affirmed.

APPENDIX E

Pertinent Provisions of Statutes Referred to

Section 6, Municipal Court Code of the State of New York.

"§ 6. *Jurisdiction.* The municipal court of the city of New York shall have jurisdiction:

3. * * *; to render judgment on confession, without an action.

Section 130, Municipal Court Code of the State of New York.

"§ 130. *When and how issued.* An execution may be issued upon a judgment * * * by the attorney for the judgment-creditor when he appears by attorney, within the times prescribed under the provisions of article forty-two of the civil practice act, the execution being directed to a marshal * * *."

Section 660, Civil Practice Act of the State of New York.

"§ 660. *Execution; time.* A sale of property by virtue of an execution * * *, must be made at public auction between the hours of nine o'clock in the morning and six o'clock in the evening."

Section 707, Civil Practice Act of the State of New York.

"§ 707. *Notices of sale of personal property.* At least six days previous notice of the time and place of a sale of personal property by virtue of the execution must be given by posting conspicuously written or printed notices thereof in at least three public places of the town or city where the sale is made. * * *."

Appendix E

Article 3—A, Sections 50-581 of the Personal Property Law of the State of New York.

"§ 50. *Article may be known by short title.*

This article may be cited as the "uniform trust receipts law."

"§ 51. *Definitions.*

In this article unless the context or subject matter otherwise requires;

3. "Entruster" means the person who has or directly or by agent takes a security interest in goods, documents or instruments under a trust receipt transaction. * * *.

4. "Goods" means any chattels personal other than; * * *."

7. "new value" includes new advances or loans made * * *."

8. "Person" means, as the case may be, an * * * corporation * * *."

9. "Possession" as used in this article with reference to possession taken or retained by entruster means actual possession of goods. * * *."

12. "Security interest" means property interest in goods * * * and includes the interest of a pledgee, and title, whether or not expressed to be absolute, whenever such title is in substance taken or retained for security only."

14. "Trustee" means the person having or taking possession of goods * * * under a trust receipt transaction * * *."

15. "Value" means any consideration sufficient to support a simple contract. An antecedent or pre-existing claim, whether for money or not, " * * *, constitutes value where goods * * * are taken either in satisfaction thereof or as security."

"§ 52. *What constitutes trust receipt transaction and trust receipt.*

1. A trust receipt transaction within the meaning of this article is any transaction to which an entruster and a trustee are parties, for one of the purposes set forth in subdivision three of this section, whereby

(ii) be pursuant to a prior or concurrent written and signed agreement of the trustee to give such a writing

The security interest of the entruster may be derived from the trustee or from any other person, and by pledge or by transfer of title or otherwise.

2. A writing such as is described in subdivision one, paragraph (i), of this section signed by the trustee, and given in or pursuant to such a transaction, is designated in this article as a "trust receipt". No further formality of execution or authentication shall be necessary to the validity of a trust receipt.

3. A transaction shall not be deemed a trust receipt transaction unless the possession of the trustee thereunder is for a purpose substantially equivalent to any one of the following:

(a) In the case of goods * * * for the purpose of selling or * * * or of procuring their sale * * *."

Appendix E

"§55. *Validity between the parties.*

Between the entruster and the trustee the terms of the trust receipt shall * * * be valid and enforceable. * * *."

"§56. *Repossession, and entruster's rights on default.*

1. The entruster shall be entitled as against the trustee to possession of the goods * * * on default, and as may be otherwise specified in the trust receipt.

2. An entruster entitled to possession under the terms of the trust receipt * * * may take such possession without legal process, whenever that is possible without breach of the peace.

3. (a) After possession taken, the entruster shall * * * hold such goods * * * with the rights and duties of a pledgee.

(b) An entruster in possession may, on or after default, give notice to the trustee of intention to sell, and may, not less than five days after the serving or sending of such notice, sell the goods * * * for the trustee's account at public or private sale, * * *. The proceeds of any such sale, whether public or private, shall be applied (i) to the payment of the expense thereof (ii) to the payment of the expenses of retaking, keeping and storing the goods * * * (iii) to the satisfaction of the trustee's indebtedness. * * * Notice of sale shall be deemed sufficiently given, if in writing, and either (i) personally served on the trustee, or (ii) sent by post-paid ordinary mail to the trustee's last known business address.

(c) A purchaser in good faith and for value from an

entruster in possession takes free of the trustee's interest * * *.

4. Surrender of the trustee's interest to the ent uster shall be valid, on any terms upon which the trustee and the entruster, after default, agree."

"§ 57. *General effect of entruster's filing or taking possession.*

2. The taking of possession by the entruster shall, so long as possession is retained, have the effect of filing in the case of goods * * *."

APPENDIX F

First Count of Indictment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

—v—

ALBERT B. FASKOW, MORRIS H. SWITZER, JACK SCHULMAN and IRVING SHEAR,

Defendants.

The Grand Jury charges:

1. From on or about the 1st day of July, 1949, and continuously thereafter, up to and including February 1, 1950, at the Southern District of New York, Albert B. Faskow, the defendant, unlawfully, wilfully and knowingly devised and intended to devise a scheme and artifice to defraud the Elgin National Watch Company by inducing and attempting to induce said Elgin National Watch Company to part with its money, property and credit, in the manner and by the means hereinafter set forth.

2. It was part of said scheme and artifice to defraud that the defendant, Albert B. Faskow, on the 31st day of July, 1949, would prepare a financial statement purporting to show the financial condition of Berkeley Jewelers, Inc.

3. It was further a part of said scheme and artifice to defraud that the defendant, Albert B. Faskow, would induce and intend to induce the Elgin National Watch Company

to part with its money and property by falsely representing in the aforesaid financial statement, among other things:

(a) That Berkeley Jewelers, Inc., on the 31st day of July, 1949, had assets in the amount of $135,850.83;

(b) That Berkeley Jewelers, Inc., on the 31st day of July, 1949, had total liabilities in the amount of $43,128.07;

(c) That Berkeley Jewelers, Inc., on the 31st day of July, 1949, had a net worth of $92,722.76; whereas, in truth and in fact, as the defendant then and there well knew, the aforesaid representations were false in that on the 31st day of July, 1949, Berkeley Jewelers, Inc., had assets in the approximate amount of $83,344.68, liabilities of at least $226,497.17, and a deficit of approximately $143,152.51.

4. It was further a part of said scheme and artifice to defraud that the defendant, Albert B. Faskow, for the purpose of executing said scheme and artifice to defraud and attempting so to do, on or about the 29th day of August, 1949, in the Southern District of New York, did unlawfully, wilfully and knowingly cause to be placed in an authorized depository for mail matter to be sent and delivered to the Post Office Establishment of the United States, a letter addressed to:

Elgin National Watch Company

Elgin, Illinois

(Title 18, Section 1341, United States Code).